Before The
Copyright Arbitration Royalty Panel
Copyright Office
Library Of Congress
Washington, D.C 20540

Docket No. 2001-8 CARP-CD98-99

In the Matter of
Distribution of 1998 and 1999
Cable Royalty Funds

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION
OF BROADCASTERS

John I. Stewart, Jr.
Parul Desai
Michael Lazarus

CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Its Counsel

Of Counsel:

Henry L. Baumann, Esq.
Bart Stringham, Esq.

National Association of
Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

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PROPOSED PHASE I FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COMMERCIAL TELEVISION CLAIMANTS

The National Association of Broadcasters (NAB), on behalf of all U.S. Commercial Television station claimants, by its attorneys, submits these proposed findings of fact and conclusions of law in the Phase I evidentiary proceedings concerning distribution of the 1998-1999 cable copyright royalty funds.

I. INTRODUCTION

In the twenty annual royalty distribution proceedings beginning with the creation of the cable compulsory license in 1978, the Copyright Royalty Tribunal (CRT) or a Copyright Arbitration Royalty Panel (CARP) decided Phase I allocation disputes in six adjudicated proceedings. Over the course of those adjudications, the CRT and the CARP articulated and refined the decisional criteria, building in each decision on what had gone before. At the same time, they also evaluated evidence of changes in factual circumstances that affected the cable industry as a whole and the relative value of the distant signal program categories.

As the Court of Appeals stated in reviewing the third successive CRT cable distribution decision, covering the 1980 royalty year,

> [I]t is entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award.[1]

The Court went on to hold that it would be improper for the CRT to use "changed circumstances" as its sole criterion and ignore otherwise persuasive evidence "tending to show that past conclusions were incorrect."[2] But it is clear that a principal criterion for deciding the central question before this Panel -- "whether an award should differ from the prior year's award" -- is whether changed circumstances have occurred.

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1 National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922, 932 (D.C. Cir. 1985).

2 Id.

The 1990-1992 CARP Panel concluded that "'market value' is the only logical and legal touchstone" for making the royalty distribution allocations.[3] In reaching its decisions on the proper allocations of the royalty funds, the Panel focused on the quantitative evidence presented in the two "centerpieces" of the claimant groups' cases, the Bortz cable operator survey and the Nielsen viewing study.[4] The Panel began its determination of the share of each of the claimant groups by examining the Bortz and Nielsen numbers for that group, along with the award the group had received in the most recent CRT proceeding.[5]

In this proceeding, evidence of fundamentally changed circumstances in the distant signal marketplace resulting from the elimination of superstations WTBS and WWOR compels the conclusion that the parties' 1990-1992 shares must be adjusted for 1998-1999. Substantial quantitative and qualitative evidence further establishes that the share of the Commercial Television Claimants should be increased, and the share of Program Suppliers should be decreased. On the

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3 Report of the Panel, Docket No. 94-3 CARP CD 90-92, May 31, 1996 ("1990-1992 CARP Report"), at 23. This conclusion was ultimately affirmed by the Court of Appeals. National Ass'n of Broadcasters v. Librarian of Congress, 146 F.3d 907, 927 & n.18 (D.C. Cir. 1998).

4 1990-1992 CARP Report at 26-66. The Panel also considered the Besen regression analysis presented by Program Suppliers, but concluded that it "adds no reliable support to Program Suppliers' claim." Id. at 76.

5 Id. at 84 (Program Suppliers), 98 (Joint Sports Claimants), 111 (NAB), 122 (PTV), 130 (Devotionals), 140 (Canadians).

II. THE EVIDENCE OF THE CLAIMANT GROUPS

Following are proposed findings that address the principal evidence of changed circumstances and marketplace value for each of the claimant groups.

A. THE COMMERCIAL TELEVISION CLAIMANTS

1. The copyrighted works for which NAB is making a royalty claim include all of the programs produced by or for U.S. commercial television stations that were broadcast exclusively on those stations and retransmitted by distant cable systems during 1998 and 1999.[6]

2. These programs typically included station-produced newscasts and public affairs shows.[7] In addition, they included news magazine and interview shows, specials, and a variety of other programs such as children's shows, sports programs and entertainment programs.[8] By definition, the Commercial Television claim includes only works that were available exclusively on the originating station.[9]

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6 Id. at 12-13.

7 Tr. 1627-1628 (Ducey); see, e.g., NAB 1998-1999 Exhibit 9.

8 Tr. 1623, 1628 (Ducey); Statement of Dr. Richard V. Ducey at 13; NAB 1998-1999 Exhibit 8.

9 1990-1992 Carp Report at 12-13; Statement of Dr. Richard V. Ducey at 3; Tr. 1623, 1628 (Ducey).

a. The Prior Case

3. In the 1990-1992 Cable Royalty Distribution Proceeding, the last litigated cable distribution proceeding, NAB requested an award equal to its average Bortz Study share across the three years, which was 12.6%.[10] It argued that, in any event, it should receive no less than its share as measured in the Nielsen viewing study, the other principal piece of quantitative evidence in the record.[11] As the CARP observed, the 1989 CRT decision had awarded a share to NAB that was below both its Bortz and viewing study shares.[12]

4. The CARP found that the viewing study share for NAB was between 7% and 8% across the three years.[13] It found that while the Bortz survey was "highly valuable in determining market value," NAB had not presented evidence to "corroborate Bortz" with respect to its own share.[14] In considering potentially corroborating evidence, the Panel specifically found that "the viewing statistics of between 7 to 8% shown by Nielsen for NAB programming do not support Bortz."[15]

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10 1990-1992 Proposed Findings of Fact and Conclusions of Law of the National Association of Broadcasters (1990-1992 NAB Prop. Find.) at 6-7.

11 Id. at 163 n. 906.

12 1990-1992 CARP Report at 111.

13 Id.

14 Id. at 112.

15 Id.

It made an award of 7.5% of the Basic Fund royalties to NAB, finding that "NAB attracted and retained subscribers at a level equal to its viewing."[16]

5. NAB's 1990-1992 direct case evidence had been directed at meeting the explanations the CRT had given in its 1989 decision for not awarding NAB its Bortz Study share.[17] In particular, it provided evidence addressing the CRT's comment that it had not demonstrated "viewer avidity" for its programs.[18] The CARP found this new evidence "persuasive."[19] The CARP found that there had not been a "change of circumstances" for the NAB category between 1989 and 1990-1992, but that the CRT's past conclusion had been incorrect.[20] It therefore increased the NAB award from 5.7%, which the CRT had awarded in 1989, to 7.5%.[21] The dissent, also crediting the NAB's persuasive evidence of the avidity for and value of station-produced news programming,[22] would have awarded a share of 9.5%,[23] based on the

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16 Id. at 113. This 7.5% award was later adjusted mathematically to account for the settlement shares of the Music Claimants in 1990-1992 and the Canadian Claimants in 1990, resulting in an award of 7.18205% in 1990 and 7.1625% in 1991-1992.

17 See id. at 112.

18 See id.

19 Id.

20 Id. (concluding that "NAB's programming was previously undervalued").

21 Id. at 113.

22 Id. at 173.

23 Id. at 174.

conclusion that the evidence showed that the relative value of these programs was higher than their viewing share. [24]

b. The 1998-1999 Case

6. NAB's evidence in the 1998-1999 case demonstrated that there were significant changed circumstances between 1992 and 1998-1999 that warranted an increase in NAB's share and a decrease in Program Suppliers' share. NAB's evidence, as well as the evidence of other parties, also corroborated its 1998-1999 Bortz study share.

1. CHANGED CIRCUMSTANCES

a. The Elimination of WTBS

7. First, there was a "sea change" in the cable distant marketplace between 1992 and 1998.[25] That sea change was the conversion of WTBS from a distant signal to a direct-licensed cable network.[26] The reason the change is significant to the royalty awards is that, by essentially eliminating WTBS as a distant signal, it changed the configuration of programs actually purchased by cable

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24 Id. at 173.

25 Tr. 1884 (Ducey).

26 Statement of Dr. Richard V. Ducey at 7; Tr. 1593 (Ducey); Tr. 384-385 (Trautman).

operators in the distant signal marketplace.[27] In general, the relative amount of NAB distant signal programming purchased by cable operators went up, and the amount of Program Suppliers programming went down.[28]

8. In 1990-1992, the cable distant signal marketplace had been dominated by the superstations, and by WTBS above all. The superstations represented over 55% of all instances of distant Form 3 carriage, and WTBS alone, carried by virtually all Form 3 systems, represented over 28% of distant carriage instances.[29] In terms of "fees generated," as estimated by Cable Data Corporation, the superstations represented over 80% of all Form 3 royalties paid in the second accounting period of 1992.[30] The carriage of WTBS alone represented 45% of all royalties, and the carriage of WTBS and WWOR together represented nearly 55%.[31] The dominance of these superstations continued to increase until the very eve of WTBS's removal from the distant signal universe, with WTBS representing over

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27 Tr. 1600-1601, 1721-1722, 1885-86 (Ducey); Tr. 7363-7364 (Lindstrom); Tr. 7972-7975 (Gruen).

28 NAB 1998-1999 Exhibits 5, 10; Tr. 10509-10510 (Gruen).

29 JSC 1990-1992 direct case evidence, "Analysis of the Cable Copyright Royalty Funds: 1989-1992," NAB June 16, 2003 Incorporated Testimony, at Tab 25, pp 9-11.

30 Id. at pp 12-14.

31 Id. at p 13, Table 6-1.

35% of Form 3 distant carriage instances in the second half of 1997[32] compared with 28% in 1992, and representing over 48% of all Form 3 DSE's by the end of 1997, up from about 38% at the end of 1992.[33]

9. The fundamental effects of the WTBS change are clearly demonstrated in charts presented by NAB witness Dr. Richard Ducey. NAB 1998-1999 Exhibit 3 strikingly shows how radically different the relative roles of the superstations and the other station types were, in terms of distant Form 3 carriage, in the 1998-1999 period as compared with 1990-1992:

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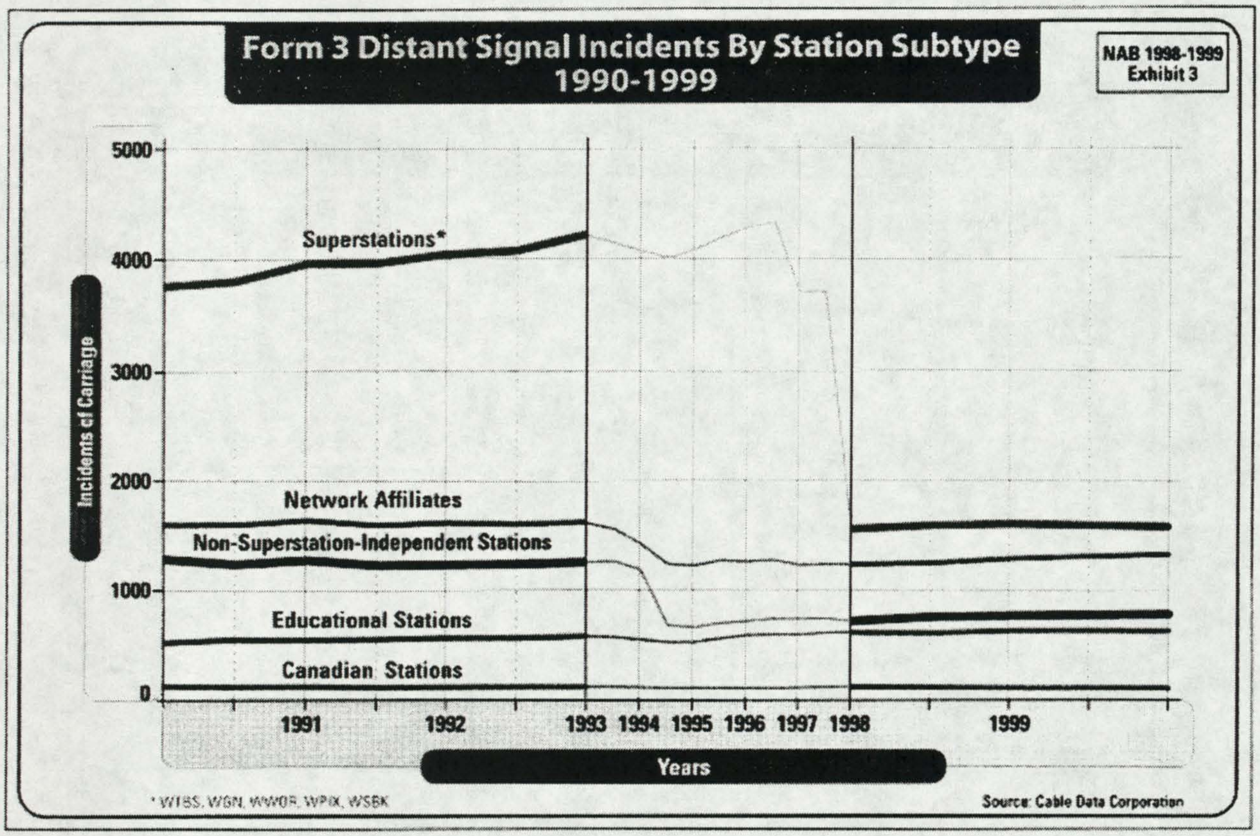
32 See Testimony of Dr. Thomas Hazlett, Appendix D (total WTBS 1997 carriage instances of 2,217 divided by total ALL 1997 carriage instances of 6,292 equals 35.2%).

33 See id. (total WTBS 1997 DSE's of 2212.396 divided by total ALL 1997 DSE's of 4570.186 equals 48.4%, compared with total WTBS 1992 DSE's of 2109.514 divided by total ALL 1992 DSE's of 5584.518 equals 37.8%).

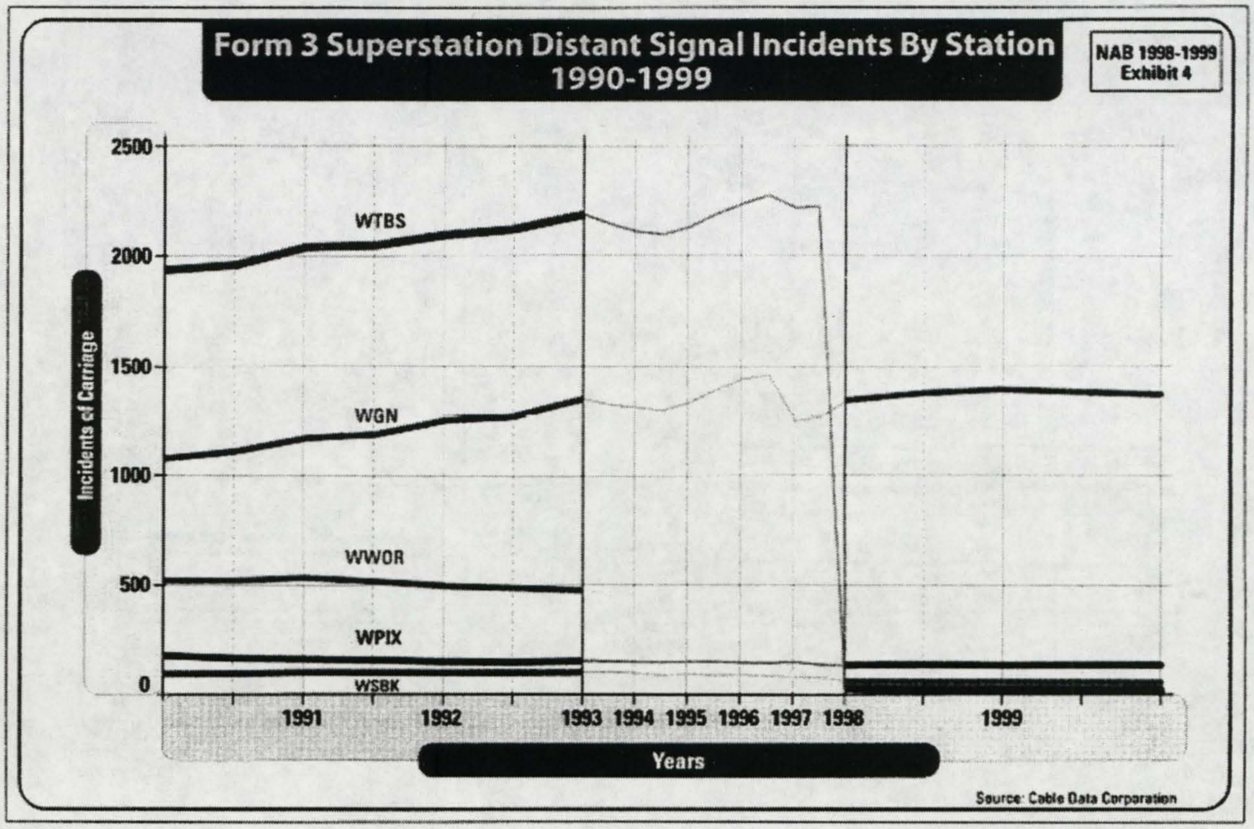
NAB 1998-1999 Exhibit 3



10. When the individual superstations are viewed separately, it is apparent that the loss of WTBS as a distant signal in 1998 (and to a lesser extent the loss of WWOR as a distant signal in 1997, when it went off the satellite[34]) was the primary reason for the difference in the configuration of distant signal carriage between 1990-1992 and 1998-1999, as shown in NAB 1998-1999 Exhibit 4:

34 Tr. 1604 (Ducey); Tr. 871 (Hazlett); Tr. 7371 (Lindstrom).

NAB 1998-1999 Exhibit 4



11. As the chart makes clear, WTBS fell from its dominant position as the most widely carried by far of all distant signals (carried by virtually every one of the 2,000+ Form 3 systems)[35] to essentially a non-entity in the distant signal marketplace. WGN, which became by default the most widely carried distant signal

[35] Statement of Dr. Richard V. Ducey at 8.

in 1998-1999, was still not nearly as ubiquitous as WTBS had been among Form 3 systems.[36]

12. WTBS was not only the dominant distant signal before 1998. It was also different from other distant signals in terms of its programming.[37] In the Nielsen viewing study for 1992, WTBS's programming quarter hours (i.e., just the raw amounts of program time) were categorized by Program Suppliers in the following percentages, compared with the programming quarter hours for all stations including WTBS:

36 See Testimony of Dr. Thomas Hazlett, Appendix D. WGN was carried by roughly 1,365 of the approximately 2,300 Form 3 systems in 1998-1999.

37 Rebuttal testimony of Arthur C. Gruen at 20; Tr. 10509-10510 (Gruen); Tr. 1329 (Egan).

1992 Program Time Percentages (Nielsen Study)

Program Category	Time Percentages (WTBS only)[38]	Time Percentages (all stations, including WTBS)[39]
Series/Movies	89.664%	55.891%
Major Sports	5.339%	0.964%
Local	3.955%	12.820%
Religious	1.042%	5.683%

It is clear from these time percentages that WTBS broadcast significantly more Program Suppliers and Sports programming and significantly less station-produced Commercial Television programming than the average distant signal.

13. This significant difference was featured by the Program Suppliers and Sports Claimants in the 1990-1992 proceeding as a reason for increasing their royalty awards.[40] It is also acknowledged by Program Suppliers and JSC witnesses in the 1998-1999 proceeding.[41]

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38 NAB 1998-1999 Exhibit 15, at p 16. See Tr. 1990-1993 (Ducey).

39 Id. at summary page (inserted between pages 15 and 16 in the record copy of Exhibit 15); see Tr. 1990 (Ducey). Note that the total percentages reported by Nielsen included percentages for Other and Educational, which do not appear on WTBS.

40 See 1990-1992 Proposed Findings and Conclusions of the Joint Sports Claimants at paras. 278-279; 1990-1992 Program Suppliers' Proposed Phase I Findings of Fact and Conclusions of Law at para. 172 and p. 203.

41 Tr. 10515-10516 (Gruen); Tr. 529-530 (Trautman); Tr. 1329 (Egan).

14. In addition, NAB witness Dr. Mark Fratrik performed a comprehensive study of program time in the distant signal marketplace, as described in more detail below, that directly measured the difference between WTBS's programming and that of all other distant signals, on average, in 1992. The results of that study showed the following program time percentages by program category for WTBS, compared with those for all distant signal stations other than WTBS, in 1992:

1992 Program Time Percentages (Fratrik Study)

Program Category	Time Percentages (WTBS only) [42]	Time Percentages (all stations, except WTBS) [43]
Syndicated	87.5%	71.9%
Sports	5.2%	4.5%
Commercial TV	6.2%[44]	10.5%
Devotional	1.2%	3.5%

Again, the independent analysis showed substantially more Syndicated programming and less station-produced Commercial TV programming on WTBS than on all other distant signals.

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42 NAB 1998-1999 Exhibit 6.

43 Id. (subscriber-weighted program time percentages). Dr. Fratrik studied all stations carried as distant signals in 1992 rather than just the 180 used in the Nielsen viewing study, but analyzed programming for a sample of days during the year rather than all 365.

44 Dr. Fratrik used a conservative number for Commercial TV programming by including a higher percentage for the category in 1992 and thus showing a smaller change between 1992 and 1998. Tr. 1990-1992 (Ducey).

15. The difference between the programming inventory on WTBS and that on all other stations is significant because the fact that WTBS was so widely carried meant that its programming mix heavily affected the overall programming mix in the distant signal marketplace.[45] The elimination of WTBS from this distant signal marketplace was an important factor in the change in the configuration of distant signal programs actually purchased in 1998-1999 as opposed to 1992.[46]

b. The Program Time Study

16. NAB witness Dr. Mark Fratrik performed a study of the amounts of the different types of distant signal programming purchased by cable operators in 1992 versus 1998-1999. Dr. Fratrik, Vice President of consulting firm BIA Financial Network, is an economist with nearly 20 years of experience in the broadcast industry.[47]

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45 Statement of Dr. Richard V. Ducey at 11; Tr. 1600-1601 (Ducey).

46 Tr. 1600-1601 (Ducey); Tr. 7972-7975 (Gruen).

47 Statement of Dr. Mark R. Fratrik at 1-2. Dr. Fratrik was employed in the NAB's Research and Planning Department from 1985 until he joined BIA in 2001. Id. at 1. At NAB and at BIA, he has been involved in conducting research studies on media industries, including radio and television. Id. at 1-2. An important component of his extensive research has been to analyze the programming component of the media industries. Id. at 2; Tr. 2028-2030 (Fratrik).

17. Dr. Fratrik began by identifying all television stations that were carried as distant signals by Form 3 cable systems during both accounting periods of 1992, 1998, and 1999, respectively, using data from Cable Data Corporation.[48] He then identified the programming on those stations using program schedule information from TVData Technologies, LLP.[49]

18. Dr. Fratrik then selected a stratified random sample of the days across the three years in the study.[50] Because there are important differences in station programming across different months and across different days of the week, and in order to ensure a representative sample of the stations' programming, Dr. Fratrik used a random number generator to select, for example, one Tuesday, one Thursday, and one Saturday in January, and then one Monday, one Wednesday,

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48 NAB 1998-1999 Exhibit 10, at 2. Because the CDC data were updated after the study was commenced, a small number of stations, collectively representing a tiny fraction of a percent of programming time, were omitted from the study even though they apparently were carried as distant signals in 1998 or 1999. Id. at 3 n.4.

49 Id. at 2. TVData was also used by Program Suppliers as a source for program names and schedule information in its Nielsen viewing study. Tr. 7220 (Lindstrom). TVData did not provide Dr. Fratrik with all the necessary programming data for one of the 683 U.S. commercial full-power stations carried as distant signals in 1998 or 1999, representing less than one-hundredth of a percent of distant signal subscribers. NAB 1998-1999 Exhibit 10, at 3 n.5.

50 NAB 1998-1999 Exhibit 10 at 6-7.

one Friday, and one Sunday in February.[51] For each year, he alternated weekdays in successive months, so as to get seven different randomly selected days of the week across every two-month period.[52] In addition, he alternated the selection between 1998 and 1999, so that January 1998 provided a Tuesday-Thursday-Saturday and January 1999 provided a Monday-Wednesday-Friday-Sunday.[53] In this way, Dr. Fratrik selected a representative sample of 42 days per year, or 126 days in all.[54]

19. It was then necessary for Dr. Fratrik to categorize the programs on the distant signals into the categories represented by the Phase I claimant groups. He did so by applying the stipulated category definitions applied by the CARP in previous proceedings.[55] For U.S. Commercial full-power stations, he considered information as to program source and type provided by TVData, program lists provided by the Devotional Claimants, program title information, analyses of multiple-station appearances of the same program title, and a further detailed review of individual program listings to categorize all programs appearing on all

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51 Id. at 6-8; Tr. 2041-2043 (Fratrik).

52 NAB 1998-1999 Exhibit 10, at 6.

53 Id. at 7.

54 Id. at 7-8; see Tr. 9365-9368 (Frankel); NAB 1998-1999 Exhibit 42-RX.

55 NAB 1998-1999 Exhibit 10, at 20 (Appendix 2). See 1990-1992 CARP Report at 11-13.

stations during the 126 sample days.[56] For Educational stations, Dr. Fratrik obtained data providing the total operating hours of each station, and assigned all such programming time to the Public Television programming category.[57] For Canadian stations, Dr. Fratrik followed a similar approach, not categorizing programs on a title-by-title basis, but instead allocating the programming time on the stations among the Canadian, Joint Sports, and Program Suppliers categories based on time allocation percentages provided by the Canadian Claimants.[58]

20. In order to represent the relative amounts of programming of the different categories actually available in the distant signal marketplace, Dr. Fratrik included a measure of the relative extent of carriage: the number of subscribers to Form 3 systems who received each station on a distant signal basis.[59] By weighting the program time by distant subscribers, Dr. Fratrik measured the relative

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56 NAB 1998-1999 Exhibit 10, at 9-11 & nn.10-11.

57 Id. at 5-6, 12-13. The same procedure was used for Mexican and Low-Power stations, which were assigned to their own categories because they are not represented by any Phase I claimant category or no programming information was available for them. Id. They represented very small fractions of a percent of the overall subscriber-weighted program time in Dr. Fratrik's study. Id. at 13, Table 3.

58 Id. at 6 & n.8. These same time allocation percentages, based on 365-day program log analyses, were presented by the Canadian Claimants in Exhibit CDN-4-C.

59 NAB 1998-1999 Exhibit 10, at 12.

amounts of programming represented by the various Phase I categories to which distant signal subscribers actually had access.[60]

21. Program Suppliers rebuttal witness Alan Whitt persuasively illustrated the significance of this point. He analyzed the relative amounts of programming among the stations in Dr. Fratrik's study on an unweighted basis, and then compared the percentages to Dr. Fratrik's results.[61] In effect, he contrasted the "inventory" of programming available to be carried on a distant signal basis (the unweighted percentages) with what the Form 3 cable operators actually chose to buy.[62] The difference between the two sets of percentages is at least a partial indication of the relative values cable operators placed on the different distant signal program types.[63] The corrected version of Mr. Whitt's analysis showed that, comparing 1992 with 1998-1999, the proportion of Program Suppliers programming actually purchased by cable operators significantly declined as compared with the change in the "inventory" of programs available, while the proportion of Commercial TV programs increased.[64]

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60 Id.; Tr. 2055-2057 (Fratrik); Tr. 1789-1791, 2008-2012 (Ducey).

61 NAB 1998-1999 Exhibits 46-RX, 47-RX, 48-RX, 49-RX.

62 See Tr. 9544-9545 (Whitt).

63 See Tr. 10238 (Crandall); Tr. 9023-9025 (Joskow); Tr. 595, 626 (Trautman).

64 NAB 1998-1999 Exhibit 48-RX; Tr. 9543-9546 (Whitt).

22. The results of Dr. Fratrik's study show a clear difference in the overall shares of distant signal programming purchased by cable operators between 1992 and 1998-1999. The following table provides the program category percentage shares for the two periods: [65]

65 NAB 1998-1999 Exhibit 10, at 13, Table 3.

Shares of Different Claimant Categories – 1992 vs. 1998-1999

Claimant Category	1992	1998-1999
Program Suppliers	77.87%	60.38%
Commercial TV	8.79%	13.00%
Public Broadcasting	5.04%	14.87%
Sports	4.75%	4.91%
Devotional	2.55%	2.94%
Canadian	1.00%	3.68%
Mexican	0.01%	0.04%
Low-Power		0.18%

23. The changes in distant signal program time percentages show an increase in station-produced Commercial TV program time and a decrease in Program Suppliers program time. As discussed below, the Bortz survey and Nielsen viewing study results show the same reciprocal changes between 1992 and 1998-1999. The measure of program time by itself does not provide a measure of the relative marketplace value of the various program categories in 1998-1999.[66] But the consistent quantitative measures (time, cable operator valuation, and viewing) of an increase in the Commercial TV share and a decrease in the Program

66 Tr. 1645-1646 (Ducey).

Suppliers share establish the changed circumstances that compel an increase in the Commercial TV share and a decrease in the Program Suppliers share.

c. Other Changed Circumstances

24. Several other changes also occurred in the distant signal marketplace, but none was as substantial as the WTBS conversion. For example, the satellite distribution of WWOR ended in 1997, and thus its carriage as a distant signal by cable operators decreased dramatically.[67] But Nielsen analyzed the relative impact of the loss of WWOR on the drop in syndicated programming among distant signals, and concluded that it was "not as significant as TBS."[68]

25. In addition, the amount of compensable syndicated programming provided by superstation WGN declined between 1992 and 1998-1999. The syndicated exclusivity (or "syndex") rules, which were reimposed in 1990, allow a program supplier to grant a broadcaster a right of local-market exclusivity with regard to a syndicated program, which would permit the station to require any cable system in its market to black that same program out on an imported, distant signal.[69] Much of the syndicated programming on distant signal WGN is

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67 NAB 1998-1999 Exhibit 4. <u>See</u> Tr. 1972 (Ducey).

68 Tr. 7371 (Lindstrom).

69 Tr. 6481 (Kessler).

replacement programming inserted onto the satellite version of the signal, which is not compensable in this proceeding.[70]

26. During the sweeps periods for 1990, 21% of the programming on the satellite version of WGN was syndicated replacement programming.[71] In 1998-99, however, over 53% of the programming on the satellite-delivered WGN signal was non-compensable syndicated programming.[72] Thus, the amount of non-compensable syndicated programming seen on WGN as a distant signal increased by approximately 153% from 1990 to 1998-99.

27. In addition, there was an increase between 1990-1992 and 1998-1999 in the "clustering" of distant signals, in terms of the distance between the stations' home markets and the cable communities where they were carried. As discussed further below, NAB witness Laurence DeFranco performed a distance analysis for 1998-1999 that replicated analyses he had presented in prior proceedings. Overall,

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70 Tr. 521-523 (Trautman).

71 1990-1992 Testimony of JSC witness Dr. Peter H. Lemieux, "Analysis of the Cable Copyright Funds, 1989-92," NAB June 16, 2003 Incorporated Testimony, at Tab 25, pp. 20-21.

72 Rebuttal statement of Dr. Richard V. Ducey at 8; PTV Ex. 12-X; PTV Ex. 13-X. Dr. Fairley calculated this percentage of non-compensable programming at 53.2% from the data Dr. Fratrik utilized for his study. Tr. 10029-10030 (Fairley).

the percentage of non-superstation distant signals carried by systems within 150 miles increased from 86.3% in 1990 to 89.2% in 1998-1999.[73]

2. MARKETPLACE VALUE

a. The Cable Television Marketplace

28. The cable television marketplace operates under fundamentally different dynamics than the broadcast marketplace.[74] In the broadcast marketplace, profit-maximizing programming choices are made on the basis of an economic structure that maximizes advertising revenue through maximizing viewing audiences in the relevant television market.[75] Programs that maximize viewing often turn out to be very similar to other programs that are already available in the market and are already heavily viewed.[76]

29. Cable operators, by contrast, make their principal revenues through subscription fees.[77] In 1998-1999, although advertising and other revenues were

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73 Statement of Laurence J. DeFranco at 3; NAB 1998-1999 Exhibits 7, 11; "NAB 1990-1992 Exhibit 41," NAB June 16, 2003 Incorporated Testimony, at Tab 17.

74 Tr. 1317-1319 (Egan); Tr. 7013-7025 (Carey).

75 Tr. 2277-2289 (Alexander); Tr. 10166-10167 (Crandall).

76 1990-1992 "Statement of Dr. Steven S. Wildman," NAB June 16, 2003 Incorporated Testimony, at Tab 12, pp. 9-12.

77 Tr. 7725 (Gruen); Tr. 2677 (Rosston); Tr. 1318 (Egan).

increasing, the percentage of revenues cable operators received from the sale to subscribers of basic and premium program channels remained over 75%.[78]

30. As a result, the economic dynamic of the cable industry is different. Profit-maximizing programming decisions by cable operators focus on attracting and retaining subscribers rather than maximizing viewership.[79] This is especially true with respect to distant signals, in which, unlike a number of basic cable networks, cable operators are prohibited from selling advertising time.[80] Cable operators focus on developing a wide variety of programming that will appeal to all parts of their cable community, and maximize the number of subscribers.[81] In this context, programs that are not already available to subscribers free off the air from local broadcast stations are more valuable than programs that are already available.[82]

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78 Statement of Dr. Richard V. Ducey at 6, Table 1; Tr. 1593-1594 (Ducey); Tr. 1318-1319 (Egan). Basic channels included those providing local and distant broadcast stations as well as basic cable networks, while premium services included pay movie channels and other such circumstances. Tr. 1598-1599 (Ducey); Tr. 8802-8804 (Ducey); Tr. 210-212 (Trautman).

79 Tr. 7669-7670 (Gruen); Tr. 766 (Crandall); Tr. 1313 (Egan); Tr. 6108 (Allen).

80 17 U.S.C. § 111(c)(3); Tr. 7664 (Gruen); Tr. 6024-6025, 6145-6146 (Allen); Tr. 794 (Crandall); Tr. 1758-1759, 8800-8801 (Ducey).

81 Tr. 6108 (Allen); Tr. 1310, 1311,1343-44 (Egan).

82 Tr. 1344 (Egan).

31. In addition, cable operators can obtain greater revenues by bundling programming channels in various combinations than by combining all their channels into a single package.[83] They may also increase their revenues by "tiering" their channel packages, requiring a basic tier to be purchased as a condition of subscribing to higher-tier services.[84]

32. A principal criterion for determining whether subscribers will be attracted or retained by a particular programming service is whether those subscribers value the service.[85] Cable operators learn about their subscribers' value preferences through surveys, by talking with subscribers and fielding their

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83 Statement of Dr. Richard V. Ducey at 6-7; Tr. 1599-1600 (Ducey). NAB 1990-1992 witness Dr. Steven Wildman explained by a simplified example how, from an economics perspective, a cable operator could actually capture total subscription revenues that were higher than the sum of all of its subscribers' "willingness to pay" by bundling different channels. 1990-1992 "Statement of Dr. Steven S. Wildman," NAB June 16, 2003 Incorporated Testimony, at Tab 12, pp. 5-7.

84 Statement of Dr. Richard V. Ducey at 6-7; Tr. 1595-1600 (Ducey); Tr. 10186-10188 (Crandall); Tr. 1057 (Hazlett).

85 Tr. 1313 (Egan). See 1990-1992 "Statement of Dr. Richard V. Ducey," NAB June 16, 2003 Incorporated Testimony, at Tab 1, p. 12 & n.6; 1990-1992 "Rebuttal Statement of Richard V. Ducey," NAB June 16, 2003 Incorporated Testimony, at Tab 29, pp. 6-7 (describing commercial studies focused on cable subscriber satisfaction); "NAB 1990-1992 Exhibits 44-R and 45-R," NAB June 16, 2003 Incorporated Testimony, at Tabs 30 and 31 (study excerpts); 1983 "Statement of Robert LaRose," NAB June 16, 2003 Incorporated Testimony, at Tab 40, p. 2; 1983 Tr. 2236 (LaRose), NAB June 16, 2003 Incorporated Testimony, at Tab 41, p. 2236 (6th page).

complaints, and by knowing their communities.[86] Cable operators do not use viewing data in evaluating distant signals.[87] Prior studies have shown that there is a difference between the way subscribers value distant signal programming on a relative basis and the relative amounts of time they spend watching that programming.[88]

b. Station-Produced Commercial TV Programs

33. Commercial TV programs constituted about 13% of all distant signal programming purchased by Form 3 cable operators in 1998-1999, in terms of the amount of distant signal program time actually made available to subscribers.[89] Live station-produced newscasts represented the great majority of this Commercial TV programming.[90] But the programs in the Commercial TV category also included a variety of other programs, including sports-related programs such as coaches' shows, pre- and post-game shows, ad specials about home teams, and morning shows on many stations, which mix news with interviews and informational

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86 Tr. 1390-1395 (Egan); Tr. 6011 (Allen); Tr. 8883-8885 (Ducey).

87 Tr. 6026-6028 (Allen); Tr. 1312-1313 (Egan).

88 See 1990-1992 "Statement of Dr. Richard V. Ducey," NAB June 16, 2003 Incorporated Testimony, at Tab 1, p. 9; "NAB 1990-1992 Exhibit 1," NAB June 16, 2003 Incorporated Testimony, at Tab 2.

89 NAB 1998-1999 Exhibit 5; NAB 1998-1999 Exhibit 10 at 13, Table 3.

90 Statement of Dr. Richard V. Ducey at 13; Tr. 1623 (Ducey).

segments.[91] The category also included public affairs shows, documentaries, and specials.[92]

34. All of the programs in the Commercial TV category, however, shared one attribute: not one of the programs was available in the cable community through any station except the distant signal being imported.[93] By contrast, syndicated programs and movies and sports games are licensed into multiple markets, and programs carried on distant signals may already be available to cable subscribers via their local stations.[94]

35. Marcellus Alexander, Executive Vice President of the NAB's Television Department since September 2002, testified about station-produced programming

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91 Statement of Dr. Richard V. Ducey at 13.

92 Dr. Ducey presented a videotape depicting four examples of commercial television non-news programming: A weekday magazine show from a small-market station called "Pepper and Friends"; a documentary produced by a larger market station, "Seeing the Elephant – Sacramento and the Gold Rush"; two segments from WGN's weekly public affairs program "People to People"; and a WGN sports talk show that follows Chicago Cubs baseball games called "The Tenth Inning." NAB 1998-1999 Exhibit 8; Tr. 1623-1645 (Ducey).

93 By definition, programs in the Commercial TV category were broadcast only on the originating distant signal. NAB 1998-1999 Exhibit 10, Appendix 2. If a program were distributed by a station to any other station, it would become a syndicated program for copyright royalty purposes.

94 Tr. 6662-6667 (Green); Tr. 137-138 (Tagliabue).

based on his 15 years of work in television station management.[95] Mr. Alexander was Vice President and General Manager of station WJZ-TV in Baltimore, Maryland, from 1989 through most of 1998.[96] From December 1998 until he joined NAB in 2002, he was Vice President and General Manager of station KYW-TV in Philadelphia, Pennsylvania.[97] In that capacity, he was responsible for all aspects of the stations' operations, and oversaw the news and production departments of the stations.[98]

36. Mr. Alexander provided lists of the station-produced programs that were broadcast by WJZ in 1998 and KYW in 1999.[99] They included a number of daily and weekly newscasts, aired in the morning, at noon, in the early evening and at night.[100] They also included, on WJZ, a morning show entitled "Rise and Shine with Don and Marty," which combined news, information, and talk segments.[101] WJZ also produced and aired a locally produced version of the "It's Academic"

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95 Statement of Marcellus Alexander, Jr.

96 Id. at 1.

97 Id.

98 Id.

99 NAB 1998-1999 Exhibit 9.

100 Id.

101 Id.

program and a weekly talk/interview program.[102] Both WJZ and KYW aired station-produced sports-related programs, including the "Ravens Postgame Show" on WJZ and "Eyewitness Sports Gameday," "Sunday Sports Rap," and "Inquirer High School Sportshow" on KYW.[103] In addition, Mr. Alexander described how the stations' newscasts themselves typically covered local and regional sports news.[104]

37. Mr. Alexander explained that a well-produced newscast from a larger market such as Philadelphia or Baltimore is likely to be appreciably better than a newscast produced by a small-market station, because of the resources available to the stations.[105] But he also described, based on his experience, how the subject matter of newscasts produced by a large-market station will be of interest to people in smaller markets adjacent to the larger station's home market.[106]

38. For example, he explained that news stories covered by a station in a large, regionally important city -- such as regional economy, educational issues, and public funding questions -- are likely to have an impact on others within the same

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102 Id.

103 Id.; Tr. 2243 (Alexander).

104 Tr. 2242-2243 (Alexander).

105 Statement of Marcellus Alexander, Jr., at 2; Tr. 2238-2240 (Alexander).

106 Statement of Marcellus Alexander, Jr., at 2-3.

state and the wider region as well.[107] Most of the distant carriage of KYW by Form 3 cable systems in 1999 was in communities in upstate Pennsylvania, in the smaller Wilkes Barre-Scranton and Harrisburg-York-Lancaster-Lebanon markets, with some additional distant carriage by a few systems in South Jersey and Delaware.[108] In those kinds of communities, regional news from Philadelphia was particularly valuable.[109] In addition, KYW's sports coverage of the Eagles, Phillies, 76'ers, and Flyers was of interest to sports fans in those smaller adjacent markets, who had no more "local" pro sports teams than those in Philadelphia.[110] But KYW also aired numerous stories on its newscasts, including award-winning consumer and health segments, that were not exclusively "local" in their interest or appeal at all.[111]

39. Similarly, WJZ in Baltimore produced and broadcast live newscasts and sports-related programs that were of interest outside the immediate Baltimore market.[112] WJZ was carried as a distant signal in 1998 in cable communities from

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107 Id.

108 Id. at 2; NAB 1998-1999 Exhibit 13.

109 Tr. 2238-2240 (Alexander).

110 Statement of Marcellus Alexander, Jr., at 3; Tr. 2242-2243 (Alexander).

111 Statement of Marcellus Alexander, Jr., at 3-4.

112 Id. at 4-5.

one end of the state of Maryland to the other, from Cumberland to Ocean City.[113] Given the importance of Baltimore as the largest city in the state of Maryland, cable subscribers located throughout the state value news programming from a strong news source in the city.[114] WJZ's newscasts covered stories about issues such as education, economic development, and Maryland politics, which affect people throughout the state, as well as stories on non-"local" issues of interest anywhere, such as a series on developing reading skills.[115] And WJZ produced sports shows and specials and covered the Orioles and Ravens in its newscasts in a way that stations elsewhere did not, which would especially appeal to fans of those teams.[116]

40. Based on his experience at KYW and WJZ, Mr. Alexander concluded that cable subscribers in smaller markets outside of the stations' immediate markets value having access to the stations' locally-produced news and other programs, because of their superior production values, their more extensive

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113 Id. at 4. The map of KYW's Form 3 distant carriage also shows carriage by systems in DC, Delaware, Pennsylvania, and West Virginia. NAB 1998-1999 Exhibit 14.

114 Statement of Marcellus Alexander, Jr., at 4.

115 Statement of Marcellus Alexander, Jr., at 4-5; Tr. 2249-2254 (Alexander).

116 Statement of Marcellus Alexander, Jr., at 5; Tr. 2254-2255 (Alexander).

coverage of regional and state-wide news, and their coverage of professional sports teams that have a broad regional following.[117]

41. Dr. Ducey also provided a few illustrative examples of programs included within the Commercial TV category. Rather than the dozens of stations and programs he presented in the 1990-1992 proceeding,[118] Dr. Ducey selected a morning show from a very small-market station, a documentary produced by a larger-market station, and public affairs and sports-related shows produced by large-market superstation WGN.[119] His selection illustrates the range of production quality and types of non-news programs produced by and aired on distant signals in 1998.[120] The first example, "Pepper and Friends," is a talk and information show produced by a station in the 151st largest market (Columbia, Missouri) that has a folksy feel, and covers topics that would be of interest to subscribers within the nearby region of rural Missouri where the station is carried as a distant signal.[121] The next, "Seeing the Elephant -- Sacramento and the Goldrush," was a

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117 Statement of Marcellus Alexander, Jr., at 5.

118 See 1990-1992 "Statement of Dr. Richard V. Ducey," NAB June 16, 2003 Incorporated Testimony, at Tab 1, pp. 17-33.

119 Statement of Dr. Richard V. Ducey at 14-17 and NAB 1998-1999 Exhibit 8 (videotape excerpts).

120 Id.

121 Statement of Dr. Richard V. Ducey at 14-15 and NAB 1998-1999 Exhibit 12 (map showing distant Form 3 carriage of station).

documentary with high production values that took a local story on the sesquicentennial of the first discovery of gold in California and turned it into an interesting and informative program that would be of interest anywhere.[122]

42. Dr. Ducey's videotape examples from WGN included excerpts from a public affairs program entitled "People to People."[123] The examples were in-depth treatments of stories that had been covered in the station's news programs.[124] Hosted by WGN news anchors, the programs combine taped background reports on the issue to be covered, and then continue with interviews with the people involved in the stories.[125] The programs from which excerpts were selected include a program on the commemoration of the Holocaust featuring an interview with a Chicago-area Holocaust survivor and a program on the release of prisoners from Illinois' Death Row after DNA tests exonerated them of a brutal Chicago-area murder.[126] Although these programs arose from "local" news stories involving

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122 Statement of Dr. Richard V. Ducey at 15 and NAB 1998-1999 Exhibit 8.

123 Statement of Dr. Richard V. Ducey at 16.

124 Id.

125 Id.

126 Id.

Chicago residents or events, the scope and interest of the program created by the station transcended the stories' local origin.[127]

43. Dr. Ducey also presented a videotaped excerpt from WGN's "The Tenth Inning" program.[128] This is a post-game show aired following Chicago Cubs game telecasts on the station, and features discussion by sportscasters of the game and its significance, as well as a look ahead to the next series.[129] Sports-related programs such as "The Tenth Inning" will naturally be of interest to fans of the teams whose games are being presented, even in distant markets.[130]

44. The regional appeal of station-produced programs described and illustrated by Mr. Alexander and Dr. Ducey is particularly significant because of the "clustering" phenomenon described by Dr. Ducey.[131] Rather than being carried far from their home markets, the vast majority of non-superstation distant signals are carried relatively close to home.[132] In an extension of the distance analysis study he

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127 Id.

128 Id. at 16-17; NAB 1998-1999 Exhibit 8.

129 Id.

130 Statement of Dr. Richard V. Ducey at 17; Tr. 1349 (Egan); Tr. 2242-2243, 2362 (Alexander).

131 Statement of Dr. Richard V. Ducey at 13-14.

132 Id.

presented in the 1989 and 1990-1992 proceedings, Mr. Laurence DeFranco, President and co-founder of iMapData, Inc., provided an analysis of the distances over which non-superstation distant signals were carried in 1998 and 1999.[133] Mr. DeFranco analyzed carriage data from Cable Data Corporation, along with geographical and political databases, to measure the mileage distance between each station carried as a distant signal by a Form 3 cable system and the city or other area identified by the cable system as its community.[134] To make the analysis comparable to prior years' analyses, Mr. DeFranco omitted five superstations (WTBS, WGN, WWOR, WPIX, and WSBK).[135]

45. The results of Mr. DeFranco's distance analysis showed a continuing increase in the "clustering" effect.[136] The percentage of distant signal incidents on Form 3 systems located within 150 miles of the station being carried was 89.2% in

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133 Statement of Laurence J. DeFranco.

134 Id. at 3-4.

135 Id. at 3. These were the five most widely carried superstations in 1990-1992. See "Analysis of the Cable Copyright Funds," NAB June 16, 2003 Incorporated Testimony, at Tab 25, Pages 9-10 and Table 5-1.

136 Statement of Laurence J. DeFranco at 3; NAB 1998-1999 Exhibit 11; NAB 1998-1999 Exhibit 7.

1998 and 1999.[137] The comparable percentages for the prior proceeding's study were 86.3% for 1990, 86.9% for 1991, and 87.6% for 1992.[138]

46. Overall, the percentage of distant signal carriage represented by superstations was substantially less in 1998-1999 than in 1990-1992, due to the loss of WTBS and WWOR.[139] Accordingly, the increase in the percentage of distant signal carriage within 150 miles between 1990-1992 and 1998-1999, when considered on an overall basis, would be larger.[140]

c. Cable Operator Testimony on the Value of Station-Produced Programs

47. The increasing value of Commercial TV station-produced programming on cable systems within their region is, most importantly, measured quantitatively

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137 Id.

138 "NAB 1990-1992 Exhibit 41," NAB June 16, 2003 Incorporated Testimony, at Tab 17.

139 See NAB 1998-1999 Exhibits 3 and 4, reproduced above.

140 Mr. DeFranco did not perform a distance analysis of the superstations. Tr. 2535 (DeFranco). JSC 1990-1992 witness Dr. Peter Lemieux provided an analysis of the geographic distribution of superstation carriage in "Analysis of the Cable Copyright Funds, 1989-92," NAB June 16, 2003 Incorporated Testimony, at Tab 25, pp. 27-29. In that analysis, he showed that carriage of WGN was more concentrated in the Central Region states around Chicago and sparser on the coasts, but that only 15% of WTBS's carriage was within the same region as Atlanta. Id. at 28. Although no distance analysis has been done that includes both superstations and non-superstations on the same basis, it would be expected, given WTBS's far more extensive carriage than any other superstation, that its elimination would have significantly

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by the cable operator surveys presented by the Joint Sports Claimants, discussed below. But that value has also been described explicitly by numerous cable operators who have testified in this and prior distribution proceedings.

48. As JSC witness Michael Egan explained, in cable systems in upstate New York, syndicated programs on distant signals from New York City "would not have been as significant a value as some of the other programming on there, the sports, that's the Yankees and the news."[141] He testified that news from New York City on the distant signals would be important to those cable subscribers, since it could not be received over the air in the cable community, and was regionally important.[142]

49. Mr. Egan testified that if his rural Louisiana cable systems, for example, carried a distant network affiliate from Baton Rouge even though it duplicated the network programming on a local network affiliate,[143] the distant signal programming of interest to his subscribers would include "some news from

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(...continued)

increased the regional clustering of all distant signals between 1990-1992 and 1998-1999.

141 Tr. 1345 (Egan).

142 Tr. 1346-1347 (Egan) (contrasting the unimportance of New York City news to subscribers in Louisiana).

143 Tr. 1351-1352 (Egan).

Baton Rouge and maybe public affairs programming."[144] JSC witness Jerry Maglio testified to this same point in the 1990-1992 proceeding.[145] Mr. Maglio explained that the cable systems in those cases carried a distant network affiliate because of its programming that was not being provided by the local affiliate, including the distant affiliate's news programming.[146]

50. In this proceeding, Mr. Egan also testified about the value of station produced programming about sports, agreeing during cross-examination that "discussions about [a] game that has just gone on and the Cubs' prospects for the next game and the like would be of interest as well to Cubs fans in Jackson [Tennessee]."[147]

51. In the 1990-1992 proceeding, JSC witness Mr. Jerry Maglio testified that cable operators, when making decisions about which distant independent and distant network affiliates to retain, were "likely to retain distant signals that originated in larger markets, the state capital or a community in a bordering state because these signals presented news programming that (like sports) was of special

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144 Tr. 1352 (Egan).

145 1990-1992 Oral Testimony of JSC witness Jerry Maglio, NAB June 16, 2003 Incorporated Testimony, at Volume 4 of 5, Tab 24, Tr. 1922.

146 Id.

147 Tr. 1349 (Egan).

interest to local cable subscribers."[148] Mr. Maglio testified that "[w]e had cable systems that were across a state line from the location of the off-air broadcast signals. And they were receiving more news from the state that they were not resident of. So that we would frequently have discussions with our systems in that situation about the need to ensure that there was a stream of news from that state available in the market."[149] Mr. Maglio also related a specific example in which a cable system in Indiana carried several local signals broadcasting from nearby Louisville, Kentucky. While subscribers were already receiving news from Louisville, his company decided that it was necessary to provide station-produced news from Indiana as well, and imported a distant signal from Indianapolis.[150]

52. In the 1990-1992 proceeding, Devotional Claimants witness Thomas Engel related about an incident in which he had wanted to take a Columbia, South Carolina distant signal off a cable system in Myrtle Beach.[151] He testified that "I just about had a riot because they wanted the news and they wanted the distant programming from Columbia because Myrtle Beach is on the North Carolina/South

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148 1990-1992 Direct Testimony of JSC witness Jerry Maglio, NAB June 16, 2003 Incorporated Testimony, at Tab 23, p. 9.

149 1990-1992 Oral Testimony of JSC witness Jerry Maglio, NAB June 16, 2003 Incorporated Testimony, at Tab 24, Tr. 1918-1919.

150 Id.

151 1990-1992 Oral Testimony of Devotional witness Thomas H. Engle, NAB June 16, 2003 Incorporated Testimony, at Tab 28, Tr. 5924.

Carolina line," and their "local" station was from Wilmington, North Carolina.[152] Devotional witness Stanley Searle, also appearing in the 1990-1992 proceeding, testified that "KWGN brings in the local news from Denver, the state capital, which is valuable to the cable operator because it is important to some of his cable subscribers."[153]

53. In the 1989 proceeding, NAB witness Robert Davies testified that the station-produced programming on KMSP from Minneapolis was a significant part of the value of distant signal programs to cable operators and cable subscribers in northern Minnesota.[154] He explained that cable subscribers all around the state of Minnesota were interested in what happened in Minneapolis, especially as far as the legislature was concerned.[155] Mr. Davies further testified that KMSP was important in distant communities because it "brings in news from a metropolitan area that is important throughout the whole region."[156] He commented that "a

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152 Id.

153 1990-1992 Rebuttal Testimony of Devotional witness Stanley Searle, JSC June 16, 2003 Incorporated Testimony, at Volume 5 of 5, Tab 31, p. 6.

154 1989 Oral Testimony of NAB witness Robert Davies, NAB June 16, 2003 Incorporated Testimony, at Tab 38, Tr. 2758.

155 1989 Oral Testimony of NAB witness Robert Davies, NAB June 16, 2003 Incorporated Testimony, at Tab 38, Tr. 2758-2759.

156 1989 Direct Testimony of NAB witness Robert Davies, NAB June 16, 2003 Incorporated Testimony, at Tab 37, p. 2.

distant signal from the largest nearby city is often important because the residents in the smaller community have ties to the city where they go to shop or sometimes for entertainment. Again, the cable subscribers have an interest in finding out what's going on in the city, which the distant station's news and other programs provide."[157]

54. Also in the 1989 proceeding, NAB witness Philip Viener testified that his cable systems in Virginia carried WTTG from Washington because his subscribers were interested in WTTG's 10 p.m. news and that "[b]esides national coverage, it provided news of Washington and Northern Virginia, in which people were interested and which was otherwise not generally available."[158] Mr. Viener testified that "news and other programs produced by the station, such as 'Redskins Playbook,' were attractive to area cable subscribers."[159] Mr. Viener also testified that the news on WTTG came on at 10:00, which was an hour before that of many other local newscasts and was "very highly thought of by many subscribers."[160] Mr. Viener testified about "a number of phone conversations and personal conversations

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157 Id.

158 1989 Direct Testimony of NAB witness Philip Viener, NAB June 16, 2003 Incorporated Testimony, at Tab 35, p. 4.

159 Id.

160 1989 Oral Testimony of NAB witness Philip Viener, NAB June 16, 2003 Incorporated Testimony, at Tab 36, Tr. 2803-2804.

with people who praised it and said it was great that we had it largely because it was superior in its production quality to the local stations and also let them go to bed earlier which was something they appreciated."[161] He testified that the WTTG news covered not only Washington D.C. news, but also northern Virginia as well, which was greatly beneficial to the many people the Richmond area who did business in Washington.[162] Mr. Viener agreed with the statement that the station produced news and other station-produced programming on WTTG were "a significant part of the value" of the distant signals his system carried.[163]

55. JSC witness Trygve Myhren testified in the 1990-1992 proceeding that news programming from broadcast station KING from Seattle, Washington would be valuable to the surrounding counties that carried KING as a distant signal.[164] A cable manager employed by Mr. Myhren's company had also testified in an earlier distribution proceeding that "in towns such as Ellensburg, Washington, or Twin

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161 1989 Oral Testimony of NAB witness Philip Viener, NAB June 16, 2003 Incorporated Testimony, at Tab 36, Tr. 2804.

162 1989 Oral Testimony of NAB witness Philip Viener, NAB June 16, 2003 Incorporated Testimony, at Tab 36, Tr. 2804-2805.

163 1989 Oral Testimony of NAB witness Philip Viener, NAB June 16, 2003 Incorporated Testimony, at Tab 36, Tr. 2803.

164 1990-1992 Oral Testimony of JSC witness Trygve Myhren, NAB July 25, 2003 Additional Incorporated Testimony, at Tab 2, Tr. 1232.

Falls, Idaho, the people in those communities relate and want news and other things from the more distant, larger markets."[165]

56. JSC witness Robert Wussler, in the 1989 proceeding, testified that several factors helped explain the importance that the cable industry attached to sports programming, including its uniqueness and originality, the fact that it is first-run, its topical nature, and the loyalty of its followers.[166] Station-produced newscasts share these same attributes with local sports programs.[167]

57. Mr. Egan agreed that cable subscribers "value programming that is generally exclusive to the station televising the event" and that "cable subscribers value first-run programming."[168] JSC witness Ms. Allen testified that "one of the

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165 1990-1992 Oral Testimony of JSC witness Trygve Myhren, NAB July 25, 2003 Additional Incorporated Testimony, at Tab 2, Tr. 1235; 1980 Oral Testimony of NAB witness Edward Hewson, NAB July 25, 2003 Additional Incorporated Testimony, at Tab 42, Tr. 1859-1862

166 1989 Direct Testimony of JSC witness Robert Wussler, JSC June 16, 2003 Incorporated Testimony, at Volume 5 of 5, Tab 27, p. 2-3.

167 1990-1992 "Statement of Dr. Richard V. Ducey," NAB June 16, 2003 Incorporated Testimony, at Tab 1, pp. 10-17.

168 Tr. 1309 (Egan).

reasons we carry news programming and documentary programming," is that cable operators want to reach people who have an interest in learning.[169]

58. Indeed, the Bortz survey's preliminary questions revealed that an average of 22.5% of respondents in 1998-1999 identified station-produced news and public affairs programs as among those "most popular" with their subscribers.[170] Of the respondents who reported using any distant signal programs in advertising and promotion, an average of 13.6% in 1998-1999 reported using news and public affairs programs.[171]

d. Quantitative Measures

59. While qualitative evidence such as cable operator testimony about the value of Commercial Television programming in particular circumstances is useful corroboration, the principal evidence of relative marketplace value is found in the "centerpiece" quantitative studies in the record, especially in the Bortz study.

60. The cable operator survey presented by the Joint Sports Claimants in this proceeding appropriately measures the marketplace value of distant signal

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169 Tr. 6112 (Allen).

170 Testimony of James M. Trautman at 13 and Table II-2.

171 Id. at 14-15 and Table II-4.

program categories.[172] It addresses the proper market entity -- the cable operators who buy distant signals for resale to their subscribers -- and measures the proper marketplace criterion -- the relative value of the different distant signal program categories in terms of attracting and retaining subscribers.[173] It provides a measure the Panel can use directly, by focusing on the distant signals the cable operators actually chose to purchase and actually carried during 1998 and 1999.[174] And the "constant sum" form of the valuation question allows an accurate and usable measure of relative value even if the absolute market value of distant signal programming varies widely among cable operators or if the absolute market values of particular program categories differ widely from each other or from the copyright royalty fees themselves.[175]

61. The results of the Bortz surveys for 1998 and 1999 reflect the widely varying marketplace circumstances faced by different cable operators.[176] Cable systems serve large and small communities, which are geographically, economically, and socially diverse, confront different levels of local broadcast and multichannel

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172 Tr. 648 (Crandall); Tr. 1919-1921 (Ducey).

173 Testimony of Dr. Robert W. Crandall at 8-9.

174 Tr. 220-222 (Trautman).

175 See, e.g., Tr. 5595-5596 (Ringold); Tr. 516-518 (Trautman).

176 Testimony of James M. Trautman at 2.

video competition, and seek to maximize their profits by appealing to their entire communities.[177] In the 1999 survey, various respondents reported relative values for distant signal sports programming of between 0% and 80%, and for news and public affairs programs of between 0% and 75%.[178] The ultimate Bortz survey results provide the average values across the entire spectrum of the diverse cable marketplace.[179]

62. For the distant signal News and Public Affairs programs category, the Bortz survey results were as follows:[180]

Bortz Results 1998-1999 (News and Public Affairs)

Year	Share
1998	14.8%
1999	14.7%

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177 Tr. 1307, 1343-1344 (Egan); Tr. 6021-6022 (Allen).

178 PTV Exhibit 2-X.

179 Tr. 396-398 (Trautman); Tr. 1343-1344 (Egan).

180 Testimony of James M. Trautman at 11. The reported results are weighted averages, in which the actual responses of the cable operators were multiplied by a factor representing the amount of cable royalties the system paid. Id. at 51. The unweighted average valuation percentages for News and Public Affairs programs were 16.4% for 1998 and 15.1% for 1999. PTV Exhibits 1-X and 2-X.

63. Significantly, the results of the Bortz surveys, which were repeated annually, showed a marked increase for the News and Public Affairs category, and a decrease for the Movies and Syndicated Shows categories, between 1990-1992 and 1998-1999.[181] The average shares for the News and Public Affairs category and the Movies and Syndicated Shows categories combined were as follows:[182]

Bortz Results 1990-1992 and 1998-1999

	AVERAGE SHARE 1990-1992	AVERAGE SHARE 1998-1999
News and Public Affairs	13.0%	14.8%
Movies and Syndicated	42.5%	38.8%

64. The Public Television Claimants proposed a series of adjustments to the Bortz survey results to address what they saw as methodological issues with the way the survey was implemented.[183] One such issue was that a number of cable

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181 Tr. 317-321 (Trautman); Tr. 9124-9126 (Johnson); NAB Demo 30.

182 Testimony of James M. Trautman at 26; Tr. 317-321 (Trautman). The 1990-1992 average for News and Public Affairs programs is elevated because of a high relative value share in 1991, which was the year of the first Gulf War and a year in which cable-delivered news programming was considered very important. Statement of Dr. Steven S. Wildman, NAB June 16, 2003 Incorporated Testimony, at Tab 12, pp. 12-13; see Tr. 6989-6990 (Carey); Overall, the pattern of Bortz survey results across the years shows a clear increase from shares generally in the 11-12% range from 1983 through 1995, followed by shares generally in the 14-15% range in 1996-2000. Testimony of James M. Trautman at 26.

183 Rebuttal Testimony of William B. Fairley.

systems selected in the initial sample were discarded from the survey because the only distant signal they carried was a PBS or a Canadian station.[184] PTV witness Dr. William Fairley proposed to adjust the results of the survey by adding a number of responses that treated the PTV or Canadian share at 100%.[185] A second issue was that respondents who carried WGN were not advised to ignore the over 50% of the station's distant signal schedule that consisted of substitute syndicated programming ineligible for distant signal royalties.[186] Dr. Fairley proposed to adjust the Bortz survey results to address this issue by reducing the reported value shares for the "syndicated shows" and "movies" categories by a proportionate percentage for all respondents who carried WGN.[187]

65. The results of making only these two adjustments[188] are to change the relative shares of the program categories as follows:[189]

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184 Testimony of James M. Trautman at 48.

185 Rebuttal Testimony of William B. Fairley at 12-17.

186 Id. at 17-19.

187 Id.

188 Dr. Fairley recommends that additional adjustments be made as well. Id. at 12-17, 20. See PTV Exhibits 8-R, 10-R.

189 The adjustments are accomplished by adding the incremental amounts calculated by Dr. Fairley in his "Method 3" approach to the original shares, which Dr. Fairley presented only in unweighted form. Tr. 10621-10628 (Fairley); PTV Exhibit 10-R.

Bortz Results 1998-1999 (Adjusted)

	Original Share	Adjusted Share
Program Suppliers	37.8%	26.4%
Sports	37.3%	40.8%
Commercial TV	15.7%	16.5%
Public TV	3.1%	7.2%
Devotional	5.8%	6.4%
Canadian	0.3%	2.7%

66. The Bortz survey results are directly corroborated by the direct testimonial evidence of cable operators who describe the value that station-produced news and public affairs programs from distant signals provide in attracting and retaining subscribers.[190]

67. The Bortz survey results are also corroborated by a substantial new econometric study presented by Dr. Gregory L. Rosston.[191] This study is an analysis of the relationship between royalties paid by cable operators for the carriage of distant signals in 1998-1999 and the programming on those stations.[192] It compares the relative amounts of the various Phase I categories of programming on the stations actually purchased by cable operators in 1998-1999 with the total royalties each system actually paid for that programming.[193] Dr. Rosston applied the well-

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190 See examples discussed above, drawn from this and prior proceedings.

191 Report of Gregory L. Rosston; Tr. 10122-10123 (Crandall).

192 Id. at 2.

193 Id. at 6, 16.

accepted technique of regression analysis in making this comparison.[194] Regression analysis is well suited for addressing the question of the relative impacts of several interacting factors on the key variable.[195]

68. Dr. Rosston's study covered all Form 3 cable systems and all distant signals they carried in each of the four accounting periods in 1998 and 1999.[196] The basic variables in Dr. Rosston's regression were the total royalties paid by each Form 3 system that carried distant signals, for which data were provided by Cable Data Corporation, and the total number of minutes of programming in each category aired by all the distant signals on the system, for which data were provided by Dr. Fratrik.[197] Dr. Rosston's study, covering all Form 3 systems that carried any distant signal, analyzed 7,529 observations (each observation consisting

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194 Id. at 5.

195 Id.

196 Report of Gregory L. Rosston at 16 and Appendix B. There were 25 Form 3 systems, located in markets like Guam and the Virgin Islands, for which certain variable data were not available, and these were eliminated from the ultimate regression. Id. at Appendix B, pp. B-1, B-2 (compare 2,552 unique systems in complete dataset with 2,527 unique systems for which all data were available).

197 Id. at Appendix B.

of royalty and programming information for a single accounting period) across the two-year period.[198]

69. Regression analyses, which simultaneously measure the relationship of each separate variable while holding all others constant, mathematically isolate the contributions of individual factors where it is not possible to observe the separate effects of those factors in isolation.[199] Because cable operators do not pay royalties separately for the different types of distant signal programming,[200] the relative values of the program types cannot be observed directly.[201] Dr. Rosston's regression analysis addresses that question based on cable operators' actual behavior -- using the distant signal programs they actually selected and the royalties they actually paid.[202]

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198 Id. at Appendix B, p. B-4.

199 Id. at 5-6; Tr. 2622-2623 (Rosston).

200 Tr. 2600-2601 (Rosston). Public Television programming is paid for separately, but at royalty rates that do not have a necessary relation to the relative value of that programming. Thus, the use of a "fee-generation" approach for PTV while following a more appropriate measure of relative marketplace value for the other programming types would introduce a distortion into the ultimate allocations. Dr. Rosston's regression analysis, by using total royalty fees paid by cable operators rather than analyzing them signal-by-signal avoids the "fee-gen" distortion. Report of Gregory L. Rosston at 7 and Appendix B.

201 Tr. 648 (Crandall).

202 Report of Gregory L. Rosston at 3, 5-7.

70. From the perspective of an economist seeking an answer to a specific question, an important early step in designing a useful regression analysis is to "specify the model" to include as many as possible of the important variables that are expected to have an effect on the ultimate "dependent" variable.[203] Doing so allows the regression more closely to measure the effects of each of the "independent" variables, with less risk that the results would partially reflect the influence of important missing variables.[204]

71. In order to include important variables affecting the royalties systems pay, Dr. Rosston considered the economic incentives of cable operators, the distant signal marketplace, and the structure and operation of the copyright royalty system.[205] He added to his basic regression specification a series of other relevant variables, including the number of subscribers to the system, the total number of channels offered by the system, the median income in the cable system's television market, the number of local channels the system provided, whether the system paid

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203 Tr. 2609-2610 (Rosston).

204 Tr. 2750, 2784-2787 (Rosston). To the extent that there are inter-relationships among variables, omitting one of them from the analysis may change the measured coefficient for the related variable. Tr. 9398-9403 (Frankel).

205 Report of Gregory L. Rosston at 2-5, 7-10.

any "3.75" royalties, whether it paid any "partially distant" royalties, and which accounting period the particular observation was from.[206]

72. The results of Dr. Rosston's regression analysis were "coefficients" for each of the independent variables.[207] These coefficients represent the effective marginal value of an additional unit of the particular variable, in the case of the programming category variables an "implicit price" for an additional minute of that particular type of programming.[208] So, for example, the coefficient for Program Suppliers programming is 0.152, indicating an implicit price of 15.2¢ for an additional minute, while the coefficient for Commercial TV programming is 0.146 (14.6¢ per minute) and the coefficient for Sports programming is 1.631 ($1.63 per minute).[209] The specific results for the non-programming variables are generally statistically significant and of the expected "sign" (i.e., whether royalties go up or down as the variable increases) and a reasonable magnitude in light of the structure of the cable royalty system.[210]

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206 Id. at 9-11.

207 Id. at 19 Table 2.

208 Id. at 8.

209 Id. at 19 Table 2, 22.

210 Id. at 18-21.

73. To translate the coefficients into share information that could be useful to the Panel, Dr. Rosston multiplied the coefficient for each program category -- the implicit price for an additional programming minute -- by the number of minutes of each category included within the observations.[211] The resulting percentage shares for the six Phase I programming categories, covering the entire period 1998-1999, were as follows:[212]

Regression Share Results 1998-1999

Program Category	Implied Share
Program Suppliers	48.87%
Sports	32.65%
Commercial TV	10.93%
Public Broadcasting	7.54%
Devotional	0.0%
Canadian	0.0%

74. As a check for the robustness of his basic specification, Dr. Rosston ran additional versions of the regression analysis, called "fixed effects" and "random effects" analyses.[213] These versions of the regression take account of the fact that multiple observations involve the same system, measured in different accounting

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211 Id. at 23.

212 Id. at 23 Table 3. The shares for the Devotional and Canadian programming categories are set at zero because they had negative coefficients, implying that cable operators were carrying enough programs of those types and would not value additional programs. Id. at 20-21, 24; Tr. 2816-2819 (Rosston).

213 Report of Gregory L. Rosston at 11-12 & n.9.

periods.[214] In effect, the alternate versions take another dimension of the data into account, and capture more of the variability from the information available.[215] The results of the fixed effects regression,[216] which include an increased coefficient that would produce a substantially higher implied share for the Commercial TV claimants,[217] support Dr. Rosston's conclusion that the basic regression results represent a "lower bound" for the Commercial TV category.[218] That is, while the basic regression analysis provides a very good but imperfect measure of the relationship between distant signal programming and the royalties, the fixed effects regression results suggest that a more complete analysis, if it were possible, would result in a higher coefficient (and royalty share) for the Commercial TV category.[219]

75. In addition, Dr. Rosston points out that broadcast stations add value in the distant signal marketplace that is not captured by the value of the programs they own.[220] Dr. Rosston testified that evidence supporting this additional value

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214 Id.

215 Tr. 2623-2624 (Rosston).

216 Dr. Rosston ran a statistical test, the "Wu-Hausman" test, that indicated it is more appropriate to use the fixed effects version that the random effects version. Report of Gregory L. Rosston at 22 n.18.

217 Tr. 2939 (Rosston) (28.49% share).

218 Report of Gregory L. Rosston at 24.

219 Tr. 2657-2658 (Rosston).

220 Report of Gregory L. Rosston at 24; Tr. 2658 (Rosston).

exists throughout the cable marketplace, in that cable operators generally carry whole pre-packaged channels of programming rather than creating their own channels by buying individual programs and creating their own schedules.[221] Other parties' experts and cable operator witnesses made the same point.[222] This "compilation" interest of Commercial TV claimants has been held copyrightable.[223] While there is little basis to measure a separate value for such an element of the distant signals, the fact that it is valuable is evident.[224] As Dr. Rosston concludes, this is another reason why the percentage share measured by the basic regression analysis is a lower bound on the appropriate royalty share for the Commercial Television category.[225]

76. In essence, the Rosston regression analysis approaches the same question as the Bortz cable operator survey, but from a different perspective.[226] Given that the approaches of the two studies are so different, the fact that their respective results are so relatively close in terms of the rank order of the program

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221 Tr. 2658-2660 (Rosston). See Rebuttal Testimony of Dr. Andrew S. Joskow at 7-8.

222 Tr. 772-774 (Crandall); Tr. 518 (Trautman); Tr. 1402-1403 (Egan).

223 NAB v. CRT, 675 F.2d 367, 378 (D.C. Cir. 1982).

224 Tr. 2658-2660 (Rosston); but see 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9556, 9566 (Mar. 7, 1983).

225 Report of Gregory L. Rosston at 24.

226 Tr. 2919-2921 (Rosston); Tr. 10122-10123 (Crandall).

categories and the general orders of magnitude of the relative shares is remarkable.[227]

77. Finally, in terms of quantitative record evidence corroborating the Bortz survey results for NAB, the Nielsen viewing study presented by Program Suppliers provides powerful confirmation. In the first place, the viewing share presented by Program Suppliers witnesses for the Commercial TV category was virtually double what it had been in the 1990-1992 proceeding.[228] But even more remarkably, the reported viewing shares for NAB, compared with the Bortz Study shares, are as follows:[229]

Comparison of Bortz and Nielsen Shares for Commercial TV Category

Year	Bortz Study Share	Nielsen Viewing Study Share
1998	14.8%	14.4%
1999	14.7%	15.0%

78. The Panel in the 1990-1992 proceeding cited as a specific ground for declining to award NAB its full Bortz Study share that the viewing study share for NAB in that year was below the Bortz Study share and thus "do not support

227 Tr. 2919-2921 (Rosston); Tr. 10122-10124 (Crandall).

228 NAB's viewing share as measured by Nielsen for 1990-1992 was between 7% and 8%. 1990-1992 CARP Report at 30. In the comparable version of the viewing studies presented in this proceeding, the NAB share is 14.4% for 1998 and 15.0% for 1999. PS Exhibits 20, 22 (Households, Total Year).

229 Testimony of James M. Trautman at 11, Table II-1, PS Exhibits 20, 22.

B. THE PROGRAM SUPPLIERS CLAIMANTS

79. The Program Suppliers presented ten witnesses in the direct case phase of the proceeding. As in prior cable royalty distribution proceedings, their case again centered on a Nielsen viewing study, presented by representatives of Nielsen and the Motion Picture Association of America ("MPAA").

1. CHANGED CIRCUMSTANCES

80. Jack Valenti, President and CEO of the MPAA, testified in introducing the Program Suppliers case that "Nielsen ratings" are the best measure of "viewership, and ultimately ***value***, that exists in the broadcast market today."[231] He went on to urge that the special Nielsen study MPAA prepared for use in this case be viewed as more than a "reference point" and instead be given greater importance in allocating royalties.[232]

81. Paul Lindstrom, a senior vice president with Nielsen Media Research, presented the special viewing study. He explained that it was based on a stratified sample of approximately 180 distant stations selected by Nielsen.[233] Marsha

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231 Testimony of Jack Valenti at 8 (emphasis in original).

232 Id. at 8-9.

233 Testimony of Paul Lindstrom at 4-5; PS Exhibit 19 at Appendix A (1998 list), PS Exhibit 21 at Appendix A (1999 list).

Kessler of MPAA provided Nielsen with a list of the counties in which each of the selected stations was estimated to be a "local" signal for copyright royalty purposes.[234] Using viewing data that had been collected in its national meter sample in 1998 and 1999, Nielsen then aggregated the reported viewing minutes for the selected stations only in households located in counties that were not designated "local."[235] Finally, Nielsen categorized the non-network programs in accordance with MPAA's instructions, and reported the aggregated viewing numbers by program category.[236]

82. The results of the viewing study were as follows:[237]

Viewing Study Results 1998-1999

Program Category	1998	1999
Program Suppliers	58.9%	61.0%
Sports	9.0%	7.9%
Commercial TV	14.4%	15.0%
Public Broadcasting	16.9%	15.1%
Devotional	0.7%	0.9%
Other	0.1%	0.1%

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234 Testimony of Paul Lindstrom at 5.

235 Id.

236 Id. at 5-6.

237 PS Exhibits 20, 22. The results reported here are for Households and for Total Year.

83. These viewing numbers represent a very significant decline for Program Suppliers.[238] Compared with the 1990-1992 viewing study, the Program Suppliers share dropped by more than 25%.[239] To put the magnitude of the decline in context, the Program Suppliers have presented and relied principally on a viewing study in every Phase I litigated proceeding since 1979. Following are the shares measured by those viewing studies for movies and syndicated series:[240]

Program Suppliers Viewing Shares 1979-1999

Year	PS Viewing Share
1979	83%
1980	82%
1983	80%
1989	84%
1990	83%
1991	83%
1992	80%
1998	59%
1999	61%

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238 Tr. 6241-6242 (Valenti); Tr. 7359-7364 (Lindstrom); Tr. 7929-7930, 7939-7940 (Gruen); NAB Demo 21.

239 Tr. 6241-6242 (Valenti); NAB 1998-1999 Exhibit 31-X.

240 The share numbers are rounded, and use the version of the viewing study that encompasses the greatest number of months during the year. Sources are CRT final determinations for 1979 (47 Fed. Reg. 9879, 9881 (Mar. 8, 1982)), 1980 (48 Fed. Reg. 9552, 9553 (Mar. 7, 1983)), 1983 (51 Fed. Reg. 12792, 12794 (Apr. 15, 1986)), and 1989 (57 Fed. Reg. 15286, 15289)), and the 1990-1992 CARP Report at p. 30. See NAB Demo 21.

84. This precipitous drop in the viewing share for Program Suppliers is principally the result of the elimination of WTBS from the distant signal marketplace. Nielsen's own processing staff, in comparing the 1998 viewing study results with prior years, noted "gains in the percentage of viewing for Local, Devotional, Sports and Non-Commercial and losses in percentage of syndicated viewing."[241] The staff person opined that "[s]ince TBS contributed such a large percentage of viewing to the past studies, I felt that these changes were due to the removal of TBS from the 1998 study."[242] She performed an analysis that added WTBS viewing numbers from a prior study to the 1998 numbers for comparison purposes, and concluded that the most significant cause of the viewing changes in 1998 was indeed the elimination of WTBS.[243] Specifically, the result of adding WTBS back to the 1998 study increased Program Suppliers' viewing share to 82.3%, comparable to the results of the unbroken string of viewing studies presented in all cable royalty distribution proceedings since 1979.[244]

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241 Tr. 7368-7369 (Lindstrom); NAB 1998-1999 Exhibit 37-X, at 145.

242 Id.

243 Id.

244 Id. at 146. She further commented that "part of the decline in viewing minutes" was also due to the elimination of WWOR, but that "[t]he effect is not as significant as TBS." Id. at 145.

2. MARKETPLACE VALUE

85. Program Suppliers witness Dr. Arthur C. Gruen makes the assertion, in a remarkable departure from a longstanding position of Program Suppliers that is repeated by Mr. Valenti even in this same proceeding,[245] that the Nielsen viewing study shares do not measure marketplace value.[246] He proposes a two step manipulation of the viewing study results: first, use only the viewing reported for 18-49-year old viewers, and second, adjust those viewing shares by a so-called "avidity" factor.[247] The results of this manipulation are the following proposed allocations:[248]

Gruen-Adjusted Viewing Shares 1998-1999

Program Category	1998-1999
Program Suppliers	67.0%
Sports	18.6%
Commercial TV	8.5%
Devotional	0.4%
Public Broadcasting	[5.5%][249]

245 Testimony of Jack Valenti, at 8-9.

246 Testimony of Arthur C. Gruen, Ph.D., at 38.

247 Id. at 37-40.

248 Id. at 40.

249 Dr. Gruen would simply allocate PTV its 1990-1992 award, rather than including it within his adjustment analysis. Id.

86. Dr. Gruen's adjustments and arguments are flawed in both their conception and their implementation. First , even if many advertisers would place a greater value on viewers in the 18-49-year demographic group than on older or younger groups,[250] as asserted by Dr. Gruen, that fact is irrelevant to measuring the relative marketplace value of distant signal programming.[251] Cable operators are prohibited by law from selling advertising on distant signals.[252] The principal economic value of distant signal programming to cable operators is instead measured by the extent to which they help attract and retain subscribers and thus maintain or increase subscription revenues.[253] Indeed, selecting distant signals on

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250 See Tr. 2282-2284 (Alexander) (25-54 demographic more important in 1998-1999.

251 Rebuttal Statement of Dr. Richard V. Ducey at 2-5; Tr. 537 (Trautman) (viewing shares are not an appropriate measure of value in this proceeding); Tr. 1312-1313 (Egan) ("Cable operators generally are far more concerned with perceived value of something than the amount of people who are viewing it at any moment in time."); Tr. 766 (Crandall) (the viewing data doesn't tell you what kinds of programs are valuable in terms of attracting and retaining subscribers). Dr. Gruen's attempt to show that cable networks also value 18-49 viewers most highly, even if successful, is irrelevant as well, since cable networks derive a substantial portion of their revenues from selling advertising. Tr. 7016-7017 (Carey).

252 See 17 U.S.C. § 111(c)(3).

253 Rebuttal Statement of Dr. Richard V. Ducey at 3; Tr. 538 (Trautman) (the value in carrying distant signals has to lie solely in terms of what they can do to attract and retain subscribers); Tr. 1427 (Egan) (specifically with distant signals, the only issue is the attractiveness of the programming to customers, the ability to gain subscribers, and the ability to retain subscribers); Tr. 6108 (Allen) (there are no other potential sources of revenue, other than attracting (continued...)

the basis that they would attract large viewing audiences in the 18-49 age group would actually tend to reduce the advertising revenues a cable operator could earn, since those distant signals would draw audiences that could instead be watching programs on a cable network, where they would add to the audience numbers the operator could sell to advertisers.[254]

87. Moreover, cable operators earn the greatest share of their revenues through monthly subscription fees, and attempt to provide programming that appeals to all parts of their market, in order to maximize the number of subscribers they have.[255] About one-third of potential subscribers are over 49 years old.[256] Cable operators would not serve their economic interests by ignoring one-third of their potential market, and the evidence of cable network carriage is consistent with that fact.[257] In making programming decisions, cable operators focus on the

(...continued)

and obtaining subscribers, that might be associated with carrying a distant signal).

254 Rebuttal Statement of Dr. Richard V. Ducey at 4.

255 Tr. 7725 (Gruen); Tr. 2677 (Rosston); Tr. 1318 (Egan); Statement of Dr. Richard V. Ducey at 6, Table 1; Tr. 1593-1594 (Ducey); Tr. 1310-1311, 1318-1319, 1343-1344 (Egan); Tr. 6108 (Allen).

256 See Testimony of Arthur C. Gruen, Ph.D. at 65; Tr. 8875-8877 (Ducey).

257 NAB Demo 23 (showing a number of widely carried cable networks whose median age of prime time audiences are over 49). Tr. 7754-7760 (Gruen); Tr. 8875-8881 (Ducey).

particular demographic group as to which they have the potential to make the greatest gains, even if that group is over 49.[258]

88. Indeed, cable operator witness Judith Allen testified that the over-50 demographic is one of increasing importance to cable operators, since they "pay their bills," and are an increasing demographic group.[259] When specifically asked whether advertisers' interest in a younger demographic was inconsistent with that view, she explained that the economics that are important to cable operators are different from those in the advertising-driven broadcast market.[260] She put the point bluntly: "We don't care what age you are so long as you're satisfied enough with the offering that you continue to write that subscription check."[261]

89. Dr. Gruen argued that a cable operator would prefer programming that would attract 18-49 year-old viewers because that would increase the possibility of selling added-revenue "ancillary services."[262] But he provided no

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258 Tr. 8875-8881 (Ducey) (describing cable operator marketing strategy focused on an older demographic that wanted Fox News).

259 Tr. 6112-6113 (Allen).

260 Tr. 6113 (Allen).

261 Id.

262 Testimony of Arthur C. Gruen, Ph.D. at 18-22.

evidence that the 18-49 demographic was the only market for such services.[263] In rebuttal, Dr. Ducey presented portions of an independent 1998 market research survey directed at cable subscribers, which found that a larger percentage of over-49 year olds were highly interested in subscribing to new digital programming tiers than of the 35-49 year old respondents.[264] Even with respect to high-speed Internet access, in which the percentage of 18-49 year olds interested in subscribing was higher than the percentage of over-49 year olds, the over-49 percentage was 7%, compared with only 11% overall.[265] Again, the 50-plus demographic group represents a significant potential market for cable operator revenues.[266]

90. In any event, the relative size of cable operator revenues derived from ancillary services in 1998-1999 -- less than [3%] -- would not be the principal consideration in cable operator program decisionmaking.[267] And distant signals, with their mix of syndicated shows, sports, news, and children's programs, would not likely be an effective way for cable operators specifically to attract 18-49 year

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[263] He presented a reanalysis of an "Interactive Television" study his company had done in 1994, id. at 21, but the advanced services he analyzed were not cable services. Tr. 7745-7747 (Gruen); NAB 1998-1999 Exhibit 38-X.

[264] NAB 1998-1999 Exhibit 16-R at p.33.

[265] Id. at p.43.

[266] Tr. 8875-8881 (Ducey).

[267] Rebuttal Statement of Dr. Richard V. Ducey at 4.

olds.[268] There were numerous cable networks available to use as "pure play" attractions for 18-49 year olds.[269]

91. In sum, there is no evidence that cable operators would benefit to any greater extent from attracting viewers in one demographic group versus another. Yet by restricting his analysis to viewing by 18-49 year old persons, Dr. Gruen eliminated more than 56% of all the distant signal viewing in the cable subscribers' households measured by the Nielsen viewing study.[270] The principal effect of this elimination was to increase the relative viewing share of Program Suppliers and decrease the relative viewing shares of Commercial TV (because a larger proportion of the 50+ viewing was to news programs) and Public Television (because a larger proportion of the 2-17 viewing was to children's programs on PBS).[271]

92. In his rebuttal testimony, PTV witness William Fairley further demonstrates the lack of any basis for Dr. Gruen's assertion that only the 18-49

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268 Tr. 6111 (Allen).

269 Rebuttal Statement of Dr. Richard V. Ducey at 4.

270 Tr. 7798-7799 (Gruen); NAB Demo 25; see PS Exhibits 20, 22.

271 Testimony of Paul Lindstrom; PS Ex. 23, PS Ex. 24. For 1998, the restriction reduced the Commercial TV and Public Television shares from 14.4% and 16.5%, respectively, to 9.8% and 9.1%, and increased the Program Suppliers share from 59.1% to 71.3%. PS Ex. 20 (comparing Total Year results for "Demographic=Persons 2+" and "Demographic=Persons Combined 18-34 and 35-49").

demographic should be considered in measuring the relative value of distant signal programming.[272] The only support Dr. Gruen proffers is an analysis designed to show that advertising per household is more closely related to cable network license fees than total day household ratings.[273] Dr. Gruen speculates, without any evidence, that cable network advertising serves as a reasonable proxy for 18-49 ratings.[274] But Dr. Fairley demonstrates that there is “no statistically significant difference between the differential in average license fees per household for cable networks ranked by advertising and the differential for cable networks ranked by total day ratings.”[275] Thus, he concludes that Dr. Gruen provides no statistical basis for asserting that cable operators place the greatest value on the 18-49 demographic.[276]

93. Dr. Gruen next calculated and applied what he called an "avidity" adjustment.[277] He defines his "avidity" measure for this purpose, however, as the ratio of the number of viewing minutes per quarter hour of programming time.[278]

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272 Rebuttal testimony of Dr. William B. Fairley at 51-55.

273 Rebuttal testimony of Dr. William B. Fairley at 51.

274 See Testimony of Arthur C. Gruen at 23.

275 Rebuttal testimony of Dr. William B. Fairley at 57.

276 Id.

277 Testimony of Arthur C. Gruen, Ph.D. at 38.

278 Id. at 38-39.

Although he describes avidity as reflecting the "interest and loyalty of viewers," this adjustment factor measures neither; it is in effect just a multiplier using the same audience size and program volume measures already reported.[279]

94. Dr. Gruen's "avidity" adjustment is only the gross amount of viewing divided by a gross time measure for each programming category.[280] This measure does not account for the intensity of viewers' preferences for particular programming.[281] Dr. Gruen admitted that his "avidity" measure did not measure whether a subscriber had a specifically intense preference for a particular type of program.[282]

95. In the 1990-1992 proceeding, Dr. Ducey presented independent research that addressed measures of viewer avidity.[283] First, he presented a

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279 Beyond the gross numbers already represented by the Nielsen study viewing shares, audience "interest" might be measured by ascertaining differences in the viewer's own reported preferences for different programs to which he or she devoted equal viewing time. Audience "loyalty" might be measured by ascertaining whether the same person watched the same program or series repeatedly. Neither is measured by Dr. Gruen's adjustment factor.

280 Rebuttal testimony of Dr. Richard V. Ducey at 6; Testimony of Dr. Arthur Gruen.

281 Rebuttal testimony of Dr. Richard V. Ducey at 6.

282 See Tr. 7821-7822 (Gruen).

283 1990-92 Direct testimony of NAB witness Dr. Richard V Ducey, NAB June 16, 2003 Incorporated Testimony, at Tab 1, pp. 8-16.

comparison of viewing and cable subscriber surveys from the 1983 proceeding that showed a clear divergence between how much cable subscribers said they valued certain distant signal programming types and how much they watched them.[284] Dr. Ducey also described two areas of independent communications research that provide additional evidence that subscribers have avidity for Commercial TV news programs.[285] He explained that news viewing typically involves what the research calls "instrumental viewing," which is associated with higher levels of satisfaction being reported by the viewers.[286] Research also shows that higher reported levels of satisfaction with cable viewing, in turn, are associated with greater likelihood of continuing a cable subscription.[287] Dr. Gruen's "avidity" adjustment did not purport to measure such effects.

96. Moreover, there were a number of flaws in Dr. Gruen's implementation of his adjustment. First, although Dr. Gruen describes the viewing/time adjustment factor as being compared against a benchmark "parity" ratio of one, he compares viewing minutes to program quarter hours, with the deceptive result that Program

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284 Id. at 8-9.

285 1990-92 Oral testimony of NAB witness Dr. Richard V Ducey, NAB June 16, 2003 Incorporated Testimony, at Tab 11, Tr. 1982-1983. See Tr. 7818-7822 (Gruen).

286 1990-92 Oral testimony of NAB witness Dr. Richard V Ducey, NAB June 16, 2003 Incorporated Testimony, at Tab 11, Tr. 1982-1986.

287 Id. at Tr. 1986.

Suppliers and Sports have above-parity "premiums" applied to their viewing shares while the other categories have below-parity discounts applied to theirs.[288] In fact, the audience/time ratios for all distant signal program categories, when measured on a comparable minutes/minutes basis, are well below "parity."[289]

97. Second, Dr. Gruen applies an arbitrary adjustment to his adjustment, by replacing his ratio with a number that is halfway between the ratio and one (called the "midpoint" adjustment).[290] He had no explanation for why he chose the midpoint rather than applying the calculate ratio adjustment.[291]

Most significantly, however, Dr. Gruen failed to account for differences in the potential size of the viewing audience to programs on different distant signals.[292] The total viewing minutes for various programs clearly were affected by whether the program appeared on WGN, available to over 6 million subscribers, or on WEAO, available only to several thousand subscribers.[293] Even if it were useful to consider Dr. Gruen's so-called "avidity" adjustment, the treatment of a quarter hour

288 Testimony of Arthur C. Gruen, Ph.D. at 38-39.

289 Tr. 7856-7857 (Gruen).

290 Testimony of Arthur C. Gruen, Ph.D. at 39.

291 Tr. 7860-7862 (Gruen).

292 Tr. 7836-7837 (Gruen).

293 Tr. 7840-7850 (Gruen); Rebuttal Statement of Dr. Richard V. Ducey at 7-8.

of program time on all stations as equal in the analysis introduced potentially significant distortions.[294] Program Suppliers presented a similar analysis of viewing and programming time in the 1989 royalty distribution proceeding. The Cable Royalty Tribunal rejected the Program Suppliers' proposal, stating:

> NAB's cross examination demonstrated that a program that had one hour of time on a superstation would more likely result in a higher viewing-to-time ratio than a program that had one hour of time on regional station, because a superstation reaches many more viewers. Therefore, the viewing-to-time ratio could be more a function of access to viewership than the intensity of the viewers, and would unfairly affect a program category like NAB which has most of its shows on regional stations.[295]

98. One way to address this last problem is to "weight" the program time on each station by the number of subscribers receiving it.[296] Doing so effectively allows a more proper comparison of actual viewing compared with potential

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294 Tr. 7407-7409 (Lindstrom); NAB Demo 26; Rebuttal Statement of Dr. Richard V. Ducey at 7-8.

295 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15289 (April 27, 1992); Tr. 7850-7852 (Gruen).

296 Rebuttal Statement of Dr. Richard V. Ducey at 8.

viewing.[297] In his rebuttal testimony, Dr. Ducey replicated the Gruen avidity adjustment, but used subscriber-weighted time measures.[298] He also used all viewing data (on a Persons 2+ basis and on a Households basis) rather than restricting it to 18-49 viewing, and used a proper minutes/minutes ratio comparison rather than minutes/quarter hours.[299] The result of correcting the methodological errors in Dr. Gruen's "avidity" adjustment is that the adjusted shares are essentially the same as the unadjusted viewing shares.[300] This is unsurprising, since the actual viewership of distant signal programs is extremely small, and any differences in the relative ratios of viewing to program time across the program categories have essentially no effect under a corrected application of Dr. Gruen's approach.[301]

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297 Id. at 7.

298 Id. at 9 & n.2.

299 Id. at 9.

300 Id. at 10; NAB 1998-1999 Exhibit 17-R.

301 Id.

C. THE JOINT SPORTS CLAIMANTS

99. As in prior proceedings, the centerpiece of the Joint Sports Claimants ("JSC") case for 1998-1999 is its Bortz cable operator survey. JSC witness James Trautman presented the current Bortz studies, along with information about prior years' studies.[302] The Bortz survey results for the Sports category were 37.0% in 1998 and 38.8% in 1999.[303] JSC's witnesses testified that the Bortz survey results provide the best available evidence of how a free marketplace would allocate cable royalties among the various types of non-network distant signal programming.[304]

100. Dr. Robert Crandall testified that the CARP in 1990-1992 did not provide an economically sound basis for reducing the JSC royalty share from their Bortz number, and that the CARP should base its awards directly on the Bortz shares.[305] He further testified that the Bortz study results should not be adjusted to reflect "supply side" considerations.[306] But JSC also presented evidence, through the testimony of Dr. Thomas Hazlett, purporting to show that, if the supply side

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302 Testimony of James M. Trautman.

303 Id. at 3.

304 Testimony of Dr. Robert W. Crandall at 8-10; Tr. 204-205 (Trautman); Tr. 1286-1287 (Egan); Tr. 6022 (Allen).

305 Testimony of Dr. Robert W. Crandall at 8-10.

306 Id. at 11-12.

perspective were nonetheless taken into account, the Commercial Television Claimants' share should somehow be reduced, due to broadcasters' supposed support of certain legislation passed in 1992 and 1994.[307] Dr. Hazlett presented a theory about the alleged effects of those legislative changes, as well as the effects of the discontinued carriage of WWOR via satellite in 1997 and the conversion of WTBS to a cable network in 1998, on the 1998-1999 cable royalty funds.[308]

101. JSC witness Commissioner Paul Tagliabue asserted that value was added to the JSC claim between 1992 and 1998, in particular because of the fact that some NFL programming, which had been non-compensable network programming in all prior distribution proceedings, was partly considered non-network programming in 1998-1999, because it had been acquired by the FOX network.[309]

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307 Testimony of Dr. Thomas Hazlett.

308 Id.

309 Tr. 122-123 (Tagliabue).

102. Lastly, JSC presented three cable industry witnesses, June Travis, Michael Egan, and Judith Allen, who testified about their views on the value of sports and other programming on distant signals.[310]

1. BORTZ SURVEY

103. The Bortz survey measures the extent to which Form 3 cable operators value, on a relative basis, the various Phase I program categories on the distant signals they actually carried during the year.[311] The results of the survey, based on responses obtained in telephone interviews with a stratified random sample of cable system managers, provide average value allocations that can be projected to the universe of cable operators in 1998-1999 with 95% certainty, within the relevant confidence intervals.[312] The Bortz survey comprised 139 cable operator responses in 1998, for a 57% response rate,[313] and 133 cable operator responses in 1999, for a 66% response rate.[314]

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310 Testimony of June Travis; Testimony of Michael Egan; Testimony of Judith Allen.

311 Testimony of James M. Trautman at 1; Tr. 218, 567, 582, 595 (Trautman).

312 Tr. 251, 500-501 (Trautman).

313 Tr. 250, 254 (Trautman); Testimony of James M. Trautman at 50.

314 Id.

104. The Bortz survey asks cable operators first about what distant signal programming types were most popular with their subscribers and which programming types were used in advertising and promotion.[315] Next, the survey asks how they would allocate a fixed budget among the various programming categories on the distant signals that they carried on their cable system in the preceding year.[316] This constant-sum approach requires a respondent to make allocations among the various programming types.[317]

105. Specifically, the cable operators were asked about the relative value of the types of programming actually broadcast on the stations they carried, in terms of attracting and retaining subscribers.[318]

106. For 1998-1999, the Bortz survey results were as follows:[319]

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315 Testimony of James M. Trautman at 13-16, 54-57, App. B (1998 System Operator Programming Questionnaire).

316 Testimony of James M. Trautman at 1-2; App. B (1998 System Operator Programming Questionnaire); Tr. 403 (Trautman).

317 Tr. 461 (Trautman).

318 Testimony of James M. Trautman at 2; 1990-1992 CARP Report at 65.

319 Testimony of James M. Trautman at 3.

Bortz Survey Results 1998-1999

Program Category	1998	1999	Avg. 1998-1999
Sports	37.0%	38.8%	37.9%
Syndicated Series & Movies	39.7%	37.8%	38.8%
News & Public Affairs	14.8%	14.7%	14.8%
Devotional	5.3%	5.7%	5.5%
PBS	2.9%	2.9%	2.9%
Canadian	0.4%	0.2%	0.3%

107. According to the Bortz survey results, station-produced News and Public Affairs programming was popular among subscribers, was used in promotions and advertising by cable operators, and was even designated by some cable operator respondents as being the most important distant signal programming with regards to promotion and advertising.[320]

108. The following percentages of cable operator respondents designated news and public affairs programming as among the most popular distant signal programming among their subscribers:[321]

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320 See Testimony of James M. Trautman at 13, 15, 16.

321 Id. at 13 and Table II-2.

Percent Naming News Among "Most Popular" 1998-1999

Question 2	1998	1999	Avg. 1998-1999
Percent naming News and Public Affairs programs as among the "most popular with [their] subscribers"	18.5%	26.5%	22.5%

109. Of the respondents who reported using distant signal programming in advertising and promotion, a significant percentage used or referred to news and public affairs programming on distant signals in advertising and promoting their systems to subscribers. The percentage breakdowns for each year are:[322]

Percent Using News in Advertising 1998-1999

Question 3b/3c	1998	1999	Avg. 1998-1999
Percent using News and Public Affairs programs for advertising and promotion to attract and retain subscribers	5.4%	21.8%	13.6%

322 Id. at 15 and Table II-4. A small number of these cable operators in both 1998 and 1999 also reported that news and public affairs programming was the most important programming category they used for promotional purposes. Id. at 15-16 and Table II-5.

110. The validity and attributes of a constant sum survey approach have been well documented in this proceeding and in prior CARP and CRT proceedings by witnesses from various claimant groups, including Commercial TV.[323]

111. In this proceeding, Canadian Claimants witness Dr. Ringold lauded the virtues of the constant sum methodology, and she employed the technique for the Canadian cable operator survey.[324] She testified that the constant sum technique fits especially well to the particular question posed in this proceeding, which is measuring how cable operators actually value the different types of programming categories on a relative basis.[325] Dr. Ringold testified that those

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323 See, e.g., JSC Demo 27 (Axelrod testimony from the 90-92 proceeding) incorporated by JSC at Volume 3 of 5, Tab 13, p. 3; JSC Demo 28 (Peterson testimony from the 1989 proceeding) incorporated for the rebuttal case by JSC at Tab 5, Tr. 4170-4175; JSC Demo 29 (Book testimony from the 1989 proceeding) incorporated by JSC at Volume 2 of 5, Tab 6, pp. 1-3; JSC Demo 30 (Bortz testimony from the 1990-1992 proceeding) incorporated by JSC at Volume 2 of 5, Tab 3, pp. 1-2; JSC Demo 31 (Salinger testimony from the 1990-1992 proceeding); JSC Demo 32 (Robinson testimony from the 90-92 proceeding) incorporated by JSC at Volume 3 of 5, Tab 11, pp. 4-5; JSC Demo 33 (Ducey testimony from the 90-92 proceeding) incorporated by JSC at Volume 3 of 5, Tab 16, p. 38.

324 Tr. 5583-5610 (Ringold).

325 Tr. 5595 (Ringold).

engaged in market research have traditionally relied upon constant sum surveys as an accurate gauge of intended behavior.[326]

112. Mr. Trautman testified that cable operators respond to the Bortz survey based on their dominant impression of the programming types carried on the distant signals they carried, and reflect their actual experience as to how much such programming there was, and what value it had.[327]

113. Mr. Trautman admitted that certain programming, such as station-produced children's programming, coaches' shows, and pre- and post-game shows, may not have been thought of as included in the News and Public Affairs category by cable operator respondents.[328]

114. Approximately 54% of the programming on WGN is substitute programming, which is not compensable in this proceeding.[329] This programming is programming inserted on the national satellite version of WGN that is not

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326 Tr. 5596 (Ringold).

327 Tr. 440 (Trautman).

328 Tr. 322-324 (Trautman). The use of a more comprehensive definition of the Commercial Television program category in the parallel ELRA study in 1983 resulted in a higher share than the Bortz study that year. See Testimony of James M. Trautman at 26, 34.

329 Rebuttal Statement of Dr. Richard V. Ducey at 8; PTV Exhibits 12-X, 13-X.

originally broadcast in Chicago on WGN, and thus does not constitute a "secondary transmission" of a "primary transmission" under the compulsory license.[330]

115. Public television witness Dr. Fairley advocates an adjustment to the Bortz survey to reflect the fact that cable operators were asked to estimate the relative value of movies and syndicated programming "actually broadcast" by WGN if the cable operator carried WGN,[331] without excluding any substitute programming (unlike the network programming on ABC, CBS, and NBC affiliates, which is expressly excluded).[332] Since the non-compensable programming inserted consists entirely of movies and syndicated programming,[333] an adjustment is proposed by Dr. Fairley on the assumption that half the value allocated to movies and syndicated shows by respondents who carried WGN was attributable to non-compensable programs.[334] Dr. Fairley's WGN adjustment involved a proportional reduction to the movies and syndicated series share for each system carrying WGN.[335] Since Program Suppliers' programming was an important part of the

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330 17 U.S.C. §§111 (c)(1),(f).

331 Tr. 9923 (Fairley); Rebuttal Testimony of Dr. William B. Fairley at 17-19.

332 Testimony of James M. Trautman at App. B, Q. 4a.

333 Tr. 524-526 (Trautman); <u>see</u> PTV Exhibit 12-X.

334 Tr. 10029-10030 (Fairley); PTV Exhibits 8-R, 10-R.

335 Rebuttal Testimony of Dr. William B. Fairley at 19.

programming on WGN, it is likely that the Program Suppliers' Bortz share was heavily influenced by the inclusion of this non-compensable programming.[336]

a. Comparison With 1990-1992 Bortz Results

116. The following chart provides the average Bortz totals for 1990-1992 for each claimant category, as compared with the average for 1998-1999:[337]

Bortz Survey Results 1990-1992 vs. 1998-1999

Program Category	1990-1992	1998-1999
Sports	37.4%	37.9%
Syndicated Series & Movies	42.5%	38.8%
News & Public Affairs	13.0%	14.8%
Devotional	3.9%	5.5%
PBS	2.9%	2.9%
Canadian	0.4%	0.3%

117. The average JSC share in the Bortz survey for 1998-1999 stayed roughly the same as its 1990-1992 share.[338] But the average Program Suppliers' share decreased from 1990-1992 to 1998-1999, from 42.5% to 38.7%, a decrease of

336 Id.

337 Testimony of James M. Trautman at 26; Tr. 317-321 (Trautman).

338 Tr. 320 (Trautman).

nearly 9%.[339] At the same time, the average Commercial Television share increased from 1990-1992 to 1998-1999, from 13.0% to 14.8%, an increase of nearly 14%.[340]

118. JSC witness Dr. Robert Crandall testified that the Bortz study results should be used as the sole basis of the royalty allocations.[341] Cable operator Judith Allen testified that, based on her experience in the cable industry, it would be fair to use the Bortz results to allocate the royalties with respect to all of the claimant categories.[342] Cable operator Michael Egan testified that the Bortz allocation of approximately 40% for the Sports category was consistent with his experience in the cable industry.[343]

b. Supply Side Argument

119. The 1990-1992 CARP majority found that the Bortz data was highly valuable, but did not use the Bortz survey results as the sole basis to determine the royalty awards for each claimant group.[344] One criticism of the Bortz survey, raised

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339 Tr. 315-321 (Trautman).

340 Id.

341 Direct Testimony of Dr. Robert W. Crandall at 8-9; Rebuttal Testimony of Robert W. Crandall at 1-2.

342 Tr. 6022 (Allen).

343 Tr. 1286 (Egan).

344 Testimony of Dr. Robert W. Crandall at 10.

by Program Suppliers in past proceedings, was that it failed to incorporate the "supply side" of a hypothetical free marketplace into its relative value measures.[345] In this proceeding, by contrast, no party has raised the "supply side" argument in favor of adjusting the results of the Bortz Study.

120. Dr. Crandall testified that any supply side adjustment is without economic merit,[346] and he does not endorse making any alterations to the Bortz allocations due to any supply side concerns.[347] He also testified that he is not urging that the CARP take account of the seller's perspective for supply side considerations for determining royalty awards.[348]

121. Dr. Crandall testified that no one has even demonstrated exactly what the seller's side is in any detail.[349] Dr. Crandall also admitted that supply side motivations are never explicitly defined in the 1990-1992 CARP report, and that he

345 Testimony of Dr. Robert W. Crandall at 10; 1990-1992 CARP Report at 66.

346 Testimony of Dr. Robert W. Crandall at 10.

347 Tr. 10244-10245 (Crandall).

348 Tr. 10244 (Crandall).

349 Tr. 10163-10164 (Crandall).

has tried to interpret what the supply side considerations would be in his own way.[350]

122. If supply side considerations were to be taken into account by the panel, Dr. Crandall argues that there is no evidence to suggest that cable system operators would spend more or less on sports programming than its allocated Bortz share.[351] On rebuttal, Dr. Crandall presented an economic analysis demonstrating that even if the supply side were to be taken into account, it would be very difficult to predict with certainty that the respective positions of sellers and buyers would produce any different allocation, and thus the Bortz survey, unadjusted, serves as the best possible indicator of relative value in this proceeding.[352]

123. There is evidence that supply side considerations are already accounted for in the Bortz survey. Mr. Trautman testified that cable operators are knowledgeable people who conduct negotiations and buy programming, and thus when responding to the Bortz survey questions are inherently reflecting their understanding of the sellers' side of the marketplace.[353] He noted that the cable

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350 Tr. 786-787 (Crandall).

351 Testimony of Dr. Robert W. Crandall at 12.

352 Rebuttal Testimony of Robert W. Crandall at 1-2 and Appendix 1; Tr. 10283 (Crandall).

353 Tr. 262-263 (Trautman).

operators have a sense, based on their experience in negotiating with cable networks, of the sellers' side of the marketplace.[354]

124. Dr. Ringold testified that she comes at markets from the buyers perspective, and that everything she teaches and thinks about with respect to different marketplaces is through the lens of the buyer.[355] Dr. Ringold also testified that a constant sum survey will implicitly take into account the conditions in which the decision-maker is making his or her valuation, and that survey respondents are making decisions within the context of their market environment.[356] Dr. Andrew Joskow, on rebuttal, presented evidence that it was unnecessary to capture the supply side of the compulsory marketplace because the supply of programming on distant signals was fixed.[357] Dr. Joskow also concluded that it was not necessary to adjust the Bortz allocations based on supply side considerations.[358]

125. JSC argues strongly that supply side considerations should not discount the Bortz results at all, but inconsistently suggests that if the CARP were wrongly to take supply side considerations into account, the Bortz survey share for

354 Tr. 516 (Trautman).

355 Tr. 5670-5671 (Ringold).

356 Tr. 5675-5676 (Ringold).

357 Rebuttal Report of Dr. Andrew S. Joskow at 9-10.

358 Id. at 2.

the Commercial Television claimants should somehow be discounted.[359] But JSC presents no evidence whatsoever that establishes that the commercial television claimants would value their programming any less than the share cable operators report they would pay for it.

126. Dr. Thomas Hazlett presented a theoretical basis for allocating a portion of the decline in the total amount of the cable royalty funds between 1991 and 1998-1999 to certain legislative changes.[360] Dr. Hazlett purports to show that if the supply side perspective were nonetheless taken into account, the Commercial Television claimants' share should somehow be reduced, due to broadcasters' supposed support of certain legislation passed in 1992 and 1994.[361] Dr. Hazlett presented a theory about the alleged effects of these legislative changes, as well as the effects of the discontinued carriage of WWOR via satellite in 1997 and the conversion of WTBS to a cable network in 1998, on the 1998-1999 cable royalty funds.[362] But his theories and analysis was based on a faulty premise, a baseline[363] that he created without examining all of the relevant factors in the distant signal

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359 Rebuttal Testimony of Dr. Robert W. Crandall at 9-10; Tr. 10246 (Crandall).

360 Testimony of Dr. Thomas Hazlett at 5-9.

361 Testimony of Dr. Thomas Hazlett.

362 Testimony of Dr. Thomas Hazlett.

363 Tr. 963-964 (Hazlett).

universe.[364] Furthermore, Dr. Hazlett did not analyze all of the relevant data available to him[365], and he places assumption on top of assumption in order to arrive at the unsupportable implication that Commercial Television Claimants advocated a reduction in the royalty fund. Dr. Hazlett acknowledged that, if the Panel decided not to consider the seller's mentality in making its determination, his testimony would be irrelevent.[366]

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364 These factors include occurrences that may have affected subscriber growth Tr. 995-996 (Hazlett). Cable operator decisions to drop particular signals in favor of other program services. Tr. 1494-1495 (Travis). Channel capacity. Tr. 6105 (Allen). Other regulatory changes. Tr. 1027 (Hazlett). Consolidations of cable systems. Tr. 1027-1028 (Hazlett); Tr. 6148 (Allen). New cable systems being formed. Tr. 1028-1030 (Hazlett). Cheating on the reporting of royalties by cable operators. Tr. 1034-1035 (Hazlett). Profit-maximizing pricing by cable operators. Tr. 1055-56 (Hazlett); Tr. 1344 (Egan); Tr. 10182-10188 (Crandall). Competitive alternatives to cable. Tr. 1063-1070 (Gruen); Tr. 1072-1073 (Hazlett); Tr. 1489-1490 (Travis). Political pressures. Tr. 1075-1076 (Hazlett); Tr. 6052-6053. And the explosion of new cable networks from 1992 to 1999. Tr. 993-997 (Hazlett); Tr. 1495 (Travis); NAB 1998-1999 Exhibit 5-X.

365 Tr. 996-997 (Hazlett).

366 Tr. 1239-1240 (Hazlett).

D. THE PUBLIC TELEVISION CLAIMANTS

127. PTV witnesses John Wilson and John Fuller testified that PBS stations provide unique, diverse, high-quality programming.[367] They focus in particular on the array of children's programming on public television.[368]

128. PTV partially bases its royalty claim on the testimony of Leland Johnson, who used a methodology based on subscriber instances of carriage anchored in the CARP's 1990-1992 award to arrive at a Public Television award of 10.3% for 1998 and 10.7% for 1999.[369] Dr. Johnson also presented a method in rebuttal, not anchored by the CARP's 1990-1992 award, that projects the PTV royalty share at an amount that is no less than 10%.[370] PTV also proposes certain adjustments to the Bortz study, presented by Dr. William Fairley.[371]

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367 Testimony of John F. Wilson at 3-18, 29-34; Testimony of John W. Fuller at 8-20.

368 Testimony of John F. Wilson at 19-21, 30-34; Testimony of John W. Fuller at 8-13.

369 Testimony of Leland L. Johnson.

370 Rebuttal Testimony of Leland L. Johnson.

371 Rebuttal Testimony of William B. Fairley at 2-51.

1. Value of PTV Programming

129. The vast majority of public televisions stations are members of PBS.[372] PBS provides financial support for programming, develops program initiatives, and distributes programming to member stations via satellite.[373] Individual public television stations also fund and acquire their own programming, separate from the National Program Service.[374]

130. John Wilson testified that this programming consists of a variety of different program types, such as local public affairs shows that cover local policy interests of a region or community, outdoor programming, cultural programming, history programming, as well as children's programming, news programming, business reports, science and technology programming, arts programming, and an overall diverse mix of programming types.[375]

131. Mr. Wilson testified that public television garnered critical acclaim during 1998-1999 in terms of media recognition.[376] He cited various awards for

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372 Testimony of John F. Wilson at 6.

373 Id.

374 Id. at 7-9.

375 Tr. 3013-3015 (Wilson).

376 Tr. 3021 (Wilson).

public television programs, some of which were also awarded to commercial television programs for their own station-produced programs.[377]

132. Mr. Wilson testified that distant public television signals have their greatest value when a cable system does not already carry a local public television signal.[378] When a cable system already has a local public television signal, however, he stated that because of their varied program schedules, a distant public television signal can also add diversity to the programming lineup.[379] Mr. Wilson testified that distant public television signals also provide value to cable operators and subscribers because they may provide their own local programming and coverage of local events that may not already be provided by the local public television signal.[380]

133. Specialty cable networks, such as Arts and Entertainment, The Learning Channel, Animal Planet, The History Channel, and the Discovery Channel all offer similar types of programming to what can be found on public television.[381] Mr. Wilson asserted that public television can select more of the best

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377 Testimony of John F. Wilson at 26-27, 29; PTV Ex. 3; Tr. 3019-3020, 3054-3057 (Wilson); NAB 1998-1999 Exhibit 20-X; NAB 1998-1999 Exhibit 21-X.

378 Tr. 3023 (Wilson).

379 Tr. 3023-3024 (Wilson).

380 Testimony of John F. Wilson at 24-25; Tr. 3025-3026 (Wilson).

381 Testimony of John F. Wilson at 25-26; Tr. 3034-3035 (Wilson).

of these types of programming.[382] Public television offers more first-run programming than any of the specialty channels.[383] "The Farmer's Wife" and "Africans in America" are two examples he cited of shows that wouldn't be found on the specialty networks.[384] Mr. Wilson testified that the specialty channels could be considered subsets of the programming found on public television, but public television offers a different and superior source of programming compared to what is available on the specialty channels.[385]

134. Mr. Wilson demonstrated that public television provides a great deal of children's programming.[386] During 1998 and 1999, new children's programming was introduced, and new production values were added to some existing series.[387] Public television aimed programming at older children, in the 10-12 range, as well.[388]

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382 Testimony of John F. Wilson at 26-27; Tr. 3035 (Wilson).

383 Tr. 3036 (Wilson).

384 Tr. 3039-3040 (Wilson).

385 Tr. 3042-3043 (Wilson).

386 Tr. 3043-3044 (Wilson).

387 Tr. 3044 (Wilson).

388 Tr. 3048 (Wilson).

135. Twenty-three percent of cable systems retransmitted a distant public television signal in 1998-1999.[389] Of those, half were also carrying a local public television signal.[390] In 1998 and 1999, on average, more than 2.1 million cable households, or 3.6% of subscribers, received their first public television signal as a distant signal.[391] About ten percent of cable subscribers overall received public television as a distant signal.[392]

136. Mr. Fuller did a study of schedule duplication in for the 1989 proceeding that concluded that in the great majority of instances, public television stations carried on the same cable system rarely duplicated programming in the identical time slots, and in fact were different on a same-time basis over 90% of the time.[393] Mr. Fuller confirmed his 1989 findings with an informal evaluation of the program duplication in thirty markets during 1993.[394] Mr. Fuller conducted a smaller, informal version of the study for 1998-99 and found similar evidence.[395]

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389 Tr. 3298 (Fuller).

390 Id.

391 Tr. 3311 (Fuller).

392 Tr. 3310-3311 (Fuller).

393 Testimony of John W. Fuller at 7; Tr. 3319-3321 (Fuller).

394 Testimony of John W. Fuller at 7-8.

395 Testimony of John W. Fuller at 8.

137. Twenty-eight percent of all households in the U.S. had children under the age of 12 in the 1999.[396] Mr. Fuller testified that children are avid viewers of public television, basing his conclusion on various surveys and on comments from parents over the years.[397]

138. Carriage of distant public television signals tends to be regional, and Mr. Fuller testified that a reason for that phenomenon is that people want to see regional types of programming.[398] Virtually all cable systems that carried distant public television signals carried a signal from a nearby city.[399]

139. Regional interest and appeal are not limited to public television.[400] Mr. Fuller testified that local and regional programming produced by commercial television stations would also have value in distant cable markets.[401] Commercial television stations produce programming that deals with state political affairs,

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396 Testimony of John W. Fuller at 9; Tr. 3340 (Fuller).

397 Testimony of John W. Fuller at 10-11; Tr. 3337-3338 (Fuller). This was borne out in the Nielsen viewing studies presented by Program Suppliers in this proceeding, which show an even higher viewing percentage share for PBS programming in the age 2-17 demographic than overall. See PS Ex. 20; PS Ex. 22.

398 Tr. 3330-3331 (Fuller).

399 Testimony of John W. Fuller at 6; Tr. 3332 (Fuller).

400 Tr. 3355 (Fuller).

401 Id.

similar to the state political coverage from some public television stations.[402] A coach's show about a local or regional sports team would likewise have appeal within the region in which the team plays.[403] A news program from Chicago on a distant public television signal would have local and regional interest for nearby cities, such as Rennselear, Indiana.[404] This program would be similar to news on commercial television stations, as they provide local and regional content to nearby cities.[405] News about events in the state of Maryland, from a distantly carried commercial television station, would be of interest to cable operators and subscribers in the surrounding region.[406]

140. Mr. Fuller also discussed a study conducted by WTBS and presented by Mr. Sieber in the 1990-1992 CARP proceeding.[407] The top rated attributes from the WTBS survey were "high quality programs," "limited commercial interruptions," "programs the family can watch together," "a wide variety of programming," "programs that make you think," "programs with something for everyone,"

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402 Tr. 3357-3358 (Fuller).

403 Tr. 3359-3360 (Fuller).

404 Tr. 3360-3364 (Fuller). Indeed, Mr. Fuller agreed that WGN's nightly Chicago news program, which airs at 9:00 p.m., would provide an early alternative that is not likely to be available locally. Tr. 3363-3364 (Fuller).

405 Tr. 3363-3364 (Fuller).

406 Tr. 3365-3366 (Fuller).

407 Testimony of John W. Fuller at 19-20; Tr. 3340-3343 (Fuller); NAB Demo 9.

"programs that keep you informed," "educational programming for children," "a predictable schedule," "information through newsbreaks," and "programs not available on any of the networks."[408]

141. Mr. Fuller testified that the results of the WTBS survey, though conducted in 1991, would still be applicable to cable subscribers today, as he has seen other data and surveys that corroborated the results.[409] Mr. Fuller testified that the Roper organization conducts a survey every year that asks similar questions to the WTBS study, and those findings have been consistent with the WTBS study.[410]

142. Many of the attributes described by the WTBS study apply as well to programming produced by commercial television stations.[411] Newsbreaks and news shows on commercial television would "make you think".[412] Program variety also exists on individual commercial television stations, as well as on public television.[413]

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408 Tr. 3345-3347 (Fuller); Testimony of John W. Fuller at 19-20; NAB Demo 9 at IV-10.

409 Tr. 3349-3350 (Fuller).

410 Tr. 3352-3353 (Fuller).

411 Tr. 3375 (Fuller); NAB Demo 9; NAB Demo 10.

412 Tr. 3376 (Fuller); NAB Demo 9.

413 Tr. 3380 (Fuller).

And commercial television stations provide more newscasts and news programming than public television stations.[414]

143. Information about attitudes and preferences of cable subscribers like that collected in the WTBS survey, unlike viewing numbers, is relevant to determining value in the cable marketplace, because those are the factors that will cause a person to subscribe to cable.[415] Furthermore, the WTBS study was relied upon by WTBS for strategic planning purposes, to fine tune their program schedule and adjust its content to match the needs of its subscribers.[416]

2. Quantitative Measures

144. The purpose of Dr. Johnson's testimony was to assist the CARP in setting award levels for public television for 1998 and 1999 that reflect the changes in industry structure that have occurred since 1992.[417] His approach was grounded in the CARP's 1990-1992 PTV award.[418]

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414 Id.

415 Tr. 3382 (Fuller).

416 NAB Demo 9 at I-03, I-05; NAB Demo 10 at PTV 000939; Tr. 3596 (Fuller).

417 Tr. 3661 (Johnson).

418 Testimony of Leland L. Johnson at 2-3.

145. Dr. Johnson testified that the public television share should increase to 10.3% in 1998 and 10.7% in 1999, mainly due to the effects of the WTBS withdrawal from the compulsory license pool.[419] He identified additional factors that needed to be considered, including the WWOR departure from satellite in 1997, the changing subscriber levels, and a substitution of cable networks for distant signals during the 1992-1998 period.[420]

146. Dr. Johnson testified that the public television award should be equal to the number of public television subscriber instances, weighted by its relative valuation, divided by non-public television subscriber instances, plus the public television subscriber instances, times its relative valuation.[421] Instances of carriage are important because they reflect the actual choices that cable operators are making.[422] Dr. Johnson testified that it would be fair to value public television programming at 92.4% of commercial programming.[423] While parity with commercial television would also be reasonable in his view, Dr. Johnson chose a

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419 Testimony of Leland L. Johnson at 2; Tr. 3662 (Johnson).

420 Tr. 3665 (Johnson).

421 Testimony of Leland L. Johnson at 15; Tr. 3690 (Johnson).

422 Testimony of Leland L. Johnson at 2-3, 14-15; Tr. 3841-3842 (Johnson).

423 Tr. 3686-3687 (Johnson).

92.4% of parity measure to ground his results in the CARP's 1990-1992 report.[424] Dr. Johnson chose the 1990-1992 period as his anchor because that was the most recent litigated award.[425]

147. Dr. Johnson testified that due to the departure of WTBS from the distant signal universe, public television is more important in 1998-99 in a relative sense than it was in 1990-1992.[426] Since 1990-1992 there was a massive shift in the categories of certain programming - - movies and syndicated series in particular - - from the distant signal to the cable network sector of the marketplace.[427]

148. The relative shares of the other claimants cannot be calculated with this same methodology, because the distant signal subscribers to public television can be specifically identified and separated out, while the other programming categories cannot.[428]

149. In his rebuttal testimony, Dr. Johnson further stated that public television subscriber instances may provide a basis for a public television award

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424 Tr. 3690-3692 (Johnson).

425 Tr. 3844-3845 (Johnson).

426 Tr. 3695 (Johnson).

427 Tr. 3695-3696, 3706-3707 (Johnson).

428 Tr. 3696 (Johnson).

even without being grounded in any way to the CARP's 1990-1992 PTV award.[429] Dr. Johnson asserted that the data for subscriber instances drawn only from the years 1998-99, and not relying in any way on changed circumstances from prior years, support awards for public television in excess of 10% for the two years.[430] Dr. Johnson explained that, unlike with other program categories, when a cable operator carries a distant public television signal, subscriber instances provide actual evidence of value to the cable operator in terms of attracting and retaining subscribers.[431]

150. Based on a series of estimates and assumptions. Dr. Johnson arrives at approximate subscriber-weighted programming time shares for public television of 12.8% for 1998 and 13.2% for 1999.[432]

3. PTV Bortz Share Adjustments

151. Dr. Johnson testified that the Bortz survey is useful because it focuses on the issue central to the CARP proceeding: what is the relative value of program

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429 Rebuttal Testimony of Leland L. Johnson at 1-16; Tr. 9126 (Johnson).

430 Rebuttal Testimony of Leland L. Johnson at 1.

431 Id. at 2.

432 Id. at 7.

categories to cable operators.[433] However, Dr. Johnson proposed that several adjustments be made to the Bortz public television share in order for it to be useful to the panel.[434]

152. Dr. Johnson and other witnesses contended that the exclusion from the Bortz survey of systems carrying only public television distant signals is a problem that needs to be adjusted in some way.[435] Dr. Johnson argued that the Bortz value for public television needs to be adjusted to reflect this distortion of the survey.[436]

153. Dr. Johnson also argued that since 50% of the programming on WGN is not compensable, this portion should have been excluded from consideration by respondents to the Bortz survey, in the same way that the questionnaire excluded the non-compensable network portion of network affiliate programming.[437] Dr. Johnson suggests that an adjustment needs to be made, as the non-compensable programming, which includes syndicated programming and movies, would reduce the value of programming in those categories, and necessarily increase the value of

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433 Id. at 17.

434 Id.

435 Id. at 18-19; Tr. 471-472, 482, 489 (Trautman).

436 Rebuttal Testimony of Leland L. Johnson at 19.

437 Id. at 17-18.

other categories of programming.[438] Lastly, Dr. Johnson asserts that any public television award based on the Bortz survey should be adjusted upwards to reflect the fact that public television does not participate in the 3.75 fund.[439]

154. Dr. Fairley provided the data and analyses necessary to allow adjustments to be made in the Bortz values to account for the omission of cable systems that carry only a distant public television signal, for the inclusion of non-compensable substitute syndicated programming on WGN, and for several other issues.[440]

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438 Id. at 18.

439 Id.

440 Rebuttal Testimony of William B. Fairley; PTV Ex. 8-R, 9-R, 10-R.

E. THE CANADIAN CLAIMANTS

155. The Canadian Claimants focus their claim on changes that occurred in the U.S. distant signal marketplace since the 1990-1992 proceeding, which affect the relative share represented by Canadian programming.

156. Canadian witness David Bennett testified that the most significant change since the 1990-1992 proceeding was the conversion of WTBS from a distant signal to a cable network.[441] He presented evidence about the relative amounts of distant systems, distant subscribers, and royalty fees generated by carriage of Canadian stations.[442]

157. Canadian Claimants witness Dr. Debra Ringold presented evidence from a cable operator study that cable operators who carried distant Canadian signals assigned Canadian programming 59% of the relative value of total programming on the signal in 1998 and 58% of the value in 1999.[443]

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441 Testimony of David Bennett at 7.

442 Testimony of David Bennett at 5-6; Canadian Exhibit 4-B; Rebuttal Testimony of David Bennett at 1-5.

443 The Value of Canadian Programming to Cable Systems in the United States: 1996-1999 at 13-18.

158. The Canadian claimants also presented rebuttal evidence, by economist John Calfee, asserting that neither the Bortz survey nor the Rosston regression model provide a reasonable way to allocate the Canadian claimant royalty amount, because the Canadian share is too small to be measured with precision by such methods.[444]

1. Nature of Canadian Distant Signal Programming

159. The Canadian claim includes Radio Canada, the French television network.[445] The French network carries much of the same types of programming as the English network.[446]

160. Carriage of Canadian signals is restricted by the Copyright Act, which permits U.S. cable systems to carry Canadian signals only within 150 miles of the U.S.-Canadian border and south of the forty-second parallel of latitude (the "Compulsory Zone").[447]

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444 An Economic Evaluation of Proposed Methods for Assessing the Market Value of Programming on Canadian Distant Signals ("Calfee") at 1-2.

445 Testimony of Janice de Freitas at 6.

446 Tr. 5128 (de Freitas); Testimony of Janice de Freitas at 6.

447 17 U.S.C. 111 (c)(4)(A); Canadian Ex. 1-C.

161. Canadian Claimants witnesses Janice de Freitas, Lucy Medeiros, and Andrea L. Wood described the nature of Canadian programming, its appeal in U.S. markets, and the diversity of programming on Canadian signals retransmitted in the United States.[448]

2. Increased Canadian Programming and Subscriber Instances

162. Canadian Claimants witness David Bennett examined cable retransmission data as it pertained to the Canadian claimants' case, as well as analyzing the Canadian content that was actually transmitted on Canadian distant signals.[449]

163. Mr. Bennett testified that the 1992-2 royalty dollar total generated from Canadian distant signals is virtually the same as the royalty dollar total for 1999-2.[450] The number of subscriber instances for all Form 3 distant signal carriage decreased from 124 million in 1992-2 to 117 million in 1997-2, and to 66 million in 1998-1.[451] In 1992-2 there were nearly two million subscriber instances to

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448 Testimony of Janice de Freitas; Testimony of Lucy Medeiros; Testimony of Andrea L. Wood.

449 Tr. 5269-5270 (Bennett).

450 Tr. 5282 (Bennett).

451 Tr. 5283 (Bennett).

Canadian distant signals, while in 1998-1, there were 2,327,000 subscriber instances to Canadian distant signals, increasing to 2,517,000 subscriber instances to Canadian distant signals in 1999-2.[452]

164. Mr. Bennett admits that the increase in subscriber instances of Canadian distant signals between 1998 and 1999 remained about the same as the increase in cable subscriber instances overall.[453]

165. While the subscriber instances of distant Canadian carriage increased from 1992 to 1998, the instances of cable systems carrying Canadian signals distantly decreased between 1992 and 1998-99.[454] Dr. Bennett testified that the reason for the decrease in systems carrying Canadian distant signals while the subscriber instances increased was that quite a bit of consolidation occurred amongst the cable systems that carried Canadian signals distantly.[455]

166. Mr. Bennett testified that the overall percentage of fees generated by Canadian claimants was 1.578% in the 1990-92 period, 2.89% in 1998, and 3.22% in

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452 Tr. 5284 (Bennett).

453 Tr. 5380 (Bennett); NAB 1998-1999 Exhibit 12-X.

454 Tr. 5296-5297 (Bennett).

455 Tr. 5298 (Bennett).

1999.[456] These calculations were based on excluding the "Minimum Fees" portion of the Basic Fund from the denominator.[457]

167. For his programming analysis, Mr. Bennett separated out into categories the Canadian programming and the U.S. sports and non-sports programming. In doing so, Mr. Bennett assigned all U.S. non-sports programming, even if it was a network simulcast not compensable in this proceeding, to the U.S. program supplier category (network simulcasts of JSC events were placed in the JSC category as well).[458] Mr. Bennett concedes that some of the Canadian-content programming on the Canadian distant signals would be programming that was also licensed to U.S. television stations.[459]

168. JSC presented evidence that a single cable system in Seattle accounts for $515,979 in distant signal royalties paid in 1999-2, while the distant Canadian signals as a whole accounted for only $1.3 million in distant signal royalties.[460] This means that one system accounts for about 40% of all royalties attributable to

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456 Tr. 5286 (Bennett).

457 Tr. 5286, 5290-5291 (Bennett).

458 Tr. 5307 (Bennett).

459 Tr. 5388-5389 (Bennett).

460 Tr. 5352 (Bennett); JSC Ex. 40-X.

Canadian distant signals.[461] Mr. Bennett testified that the particular cable system described also consolidated with another cable system.[462]

169. Canadian Claimants witness Dr. Ringold presented the results of a Canadian cable operator study, which was to estimate the relative value of Canadian programming on Canadian distant signals that were retransmitted by U.S. Form 3 cable operators.[463] The survey was conducted by Westat between 1996 and 1999.[464]

170. Due to the small number of systems carrying Canadian distant signals, Dr. Ringold utilized a census method, by which she attempted to measure all systems in lieu of using a sample.[465] This was done because the universe of cable systems carrying Canadian distant signals was so small that sampling would not make sense.[466]

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461 Tr. 5352 (Bennett).
462 Tr. 5353 (Bennett).
463 Tr. 5523 (Ringold).
464 Tr. 5522, 5525 (Ringold).
465 Tr. 5543 (Ringold).
466 Tr. 5543 (Ringold).

171. A constant sum methodology was utilized for the study, which Dr. Ringold testified was a "timeworn, well-tested, well-understood, well-performing method for this kind of valuation activity."[467] Dr. Ringold testified that constant sum surveys have been demonstrated to approximate actual valuation decisions made by any types of consumer, and that the technique allows for relative comparisons among the allocations.[468]

172. Respondents were also asked about independent stations or WTBS to make sure respondents would not be able to speculate on the purpose of the study, and to avoid response bias.[469] Dr. Ringold testified that these additional questions were only used as foils in her study.[470] Because of possible discrepancies in the implementation of these questions, Dr. Ringold testified that she would accord no weight to the responses to them in terms of what it means for those program claimants and the broader population of cable systems that carry their signals.[471]

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467 Tr. 5533 (Ringold).

468 Tr. 5584 (Ringold).

469 Tr. 5529-5530 (Ringold).

470 Tr. 5529-5530 (Ringold).

471 Tr. 5560 (Ringold).

F. THE MUSIC CLAIMANTS

1. CHANGED CIRCUMSTANCES

174. The Music Claimants rely principally upon a Music Use Study ("Study") that was intended to determine whether there was a change in the use of music by distant signal television stations between 1991-1992 and 1998-1999.[473] The Study sought to examine whether average music use, among all programming, had increased or decreased between the two periods.[474] But as chief Music witness Dr. Peter Boyle conceded, the Study does not, by itself, measure what percentage of the royalties paid for distant signal, non-network programming the Music Claimants would actually receive in a free marketplace.[475]

175. Although the last litigated case that determined a Music Claimants royalty share was for 1983, the Study initially compared the 1991-1992 period and the 1998-1999 period.[476] Only after a request from the Panel did Music Claimants attempt to compare the last litigated period, 1983, to the current period currently in

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[473] Tr. 4445 (Boyle).

[474] Tr. 4289 (Krupit); Tr. 4445 (Boyle).

[475] Tr. 4660 (Boyle).

[476] Tr. 4233 (Krupit).

dispute.[477] Based on the reported lack of available data from 1983, Music Claimants compared only WTBS and WGN with the 1998-1999 period.[478]

176. For the 1991-1992 study period, only ten stations were selected.[479] Five stations were those that generated the most distant signal royalty fees.[480] The remaining five stations were chosen randomly, again based on royalty fee strata, but were combined into one nominal station, "WRST."[481] "WRST" represented 19.8 percent of the fees.[482]

177. For the 1998-1999 period, to account for the radical change in "fee generation" percentages caused by the virtual elimination of WTBS from the fund, five additional stations were selected.[483] WTBS was still included, although it met neither of the selection criteria.[484]

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477 Rebuttal statement of Frank Krupit at 1.

478 Rebuttal statement of Frank Krupit at 1-2.

479 Tr. 4449 (Boyle).

480 Tr. 4447 (Boyle).

481 Tr. 4234 (Krupit); Tr. 4447-4448, 4458 (Boyle).

482 Tr. 4450 (Boyle).

483 Tr. 4234 (Krupit); Tr. 4449-4450 (Boyle).

484 Tr. 4234-4235 (Krupit); Tr. 4451-4452 (Boyle).

178. The Study examined music use on a sample of seven days for each of the years in the two study periods.[485] The sample was purportedly based on the 1983 FCC composite week, but did not actually replicate the FCC's annual random selection process.[486]

179. Lists of the non-network programming carried by the selected stations during the sample period, were created using data purchased from TV Data Technologies or from old TV Guides and newspaper listings.[487] Cue sheets, which are sent in by stations or program producers, were then used to determine the duration of music on the programs by matching the cue sheets, where available, to the program listings.[488] For a number of programs, "average cue sheets"[489] or "generic cue sheets"[490] were used.

180. The Study was able to match 2203 hours of music duration in 1991-1992, which accounted for only 77% of the programming,[491] and 3128 hours in 1998-

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485 Tr. 4236 (Krupit).

486 Tr. 4236, 4295 (Krupit); Tr. 4456-4457 (Boyle).

487 Rebuttal Testimony of Frank Krupit at 3; Tr. 4242-4243 (Krupit).

488 Tr. 4254-4256; 4264-4266 (Krupit); Tr. 4440 (Boyle).

489 Tr. 4260-4262 (Krupit).

490 Tr. 4262-4263 (Krupit).

491 Tr. 4269-4270 (Krupit).

1999, which accounted for only 73% of the programming in those years.[492] For 1983, Music Claimants were able to match some 4,000 minutes of music on some 215 hours of programming,[493] which accounted for only 66.1% of programming on WTBS and 63% of programming on WGN.[494]

181. Dr. Boyle calculated the average minutes of music per matched program hour for each of the top fee-generation stations.[495] But for the stations within "WRST," Dr. Boyle first averaged the data for all the stations to create a single representative "station."[496] The average minutes of music per hour for each station and "WRST" were then weighted by each station's share of fees generated.[497]

182. Dr. Boyle then aggregated the weighted average music minutes per hour for each station in each sample period to end up with the final weighted average music use per hour for each sample period.[498] After adding and averaging,

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492 Tr. 4269-4270 (Krupit); Statement of Frank Krupit at 9.

493 Rebuttal statement of Frank Krupit at 6.

494 Id.

495 Statement of Dr. Peter Boyle at 12-13.

496 Id.

497 Tr. 4475 (Boyle).

498 Tr. 4478 (Boyle).

for each period, the total weighted minutes of music use in the study were as follows:[499]

Weighted Average Music Use Per Hour

1991-1992	1998-1999	Percentage Increase
19.83	21.99*	10.84%*

*Results when excluding substituted programs

a. Problems With the Study

183. Music Claimants assert that the Study should be used as a basis for adjusting the 1991-92 royalty share of 4.5% as a benchmark.[500] However, Music Claimants' share of the 1991-1992 royalty funds is subject to the "Stipulation of Settlement of Claim of Music Claimants to the 1991 and 1992 Cable Royalty Funds" ("Stipulation").[501] The Stipulation makes clear that Music's 1991-1992 share

499 Statement of Peter Boyle at 15; Rebuttal Statement of Peter Boyle at 1-2 and 7-8.

500 Tr. 4412 (Boyle).

501 Joint Motion for Declaratory Ruling Concerning the Benchmark for the Music Award ("Joint Motion") at 4.

reflects a compromise agreement and does not reflect the relative value of Music's works to cable operators.[502]

184. Moreover, neither the CRT nor the CARP has ever used past settlement awards as benchmarks for awarding royalties in cable royalty distribution proceedings.[503] The CRT only considered litigated awards as benchmarks for determining changed circumstances.[504]

185. In any event, the study cannot be a reliable basis for concluding that there was an actual increase in music use between 1993 and 1998-1999. The station sample was not representative.[505] The dates selected for the study were not representative.[506] And the study's use of average minutes of music per hour only across "matched" program hours does not establish any change in total music use by stations in these years.[507] In the end, it is impossible to conclude that there was a

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502 Statement of Peter Boyle at 7; Joint Motion at 4-6. See also Fed. R. Evid. 408.

503 Joint Motion at 7.

504 Id.

505 See Tr. 4296-4297 (Krupit).

506 Tr. 8522-8523 (Schink).

507 Tr. 4865-4867, 4875-4877 (Boyle); NAB 1998-1999 Exhibit 27-X; NAB Demo 14.

statistically significant change in the use of music between the two periods based on random variables.[508]

186. In addition, the Study fails to distinguish between different types of music use, such as feature, theme, and background.[509] In prior proceedings, attempts at a music study not only considered duration, but also considered the type of use.[510]

2. MARKETPLACE VALUE

187. None of the comprehensive quantitative studies presented in this proceeding include a measure of the relative marketplace value of music, which is a program element.[511] But there is considerable evidence of the value of music in analogous markets, in the form of court decisions and marketplace license negotiations.

188. The three Music Claimants Organizations seek licenses for music use by the broadcast networks, individual television stations, cable networks, and cable

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508 Tr. 8516-8518 (Schink).

509 Tr. 8503-8504 (Schink).

510 Tr. 8503-8504; 8507-8508 (Schink).

511 See Tr. 577 (Trautman); Tr. 7434 (Lindstrom); Tr. 2613-2614 (Rosston); Tr. 5942 (Ringold); Tr. 3835 (Johnson).

operators.[512] Marketplace negotiations have resulted in licenses for a number of uses of music, but where the two sides cannot agree on a rate for the license, either party may ask a rate court, under an antitrust consent decree to which ASCAP and BMI are subject, to set the fees.[513]

189. In the cable network context, the license agreements paid for by the cable networks cover not only the cable networks' transmissions to cable systems but also the cable operators' performance of the music that is delivered to them by the network.[514] For basic networks, a royalty expressed on a percentage-of-revenue basis would apply against the network's per-subscriber fees as well as any advertising revenues it earns.[515] For the premium cable channels, for which there are no advertising revenues, the royalty fees are generally based on a per-subscriber charge, which can be evaluated as a percentage of the channel's subscriber-fee revenues.[516]

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512 Tr. 4508-4512 (Boyle).

513 Tr. 3997-4000 (Saltzman); Tr. 4419-4420, 4434-4435 (Boyle).

514 Tr. 4415-4418 (Boyle); Tr. 8482 (Schink).

515 Tr. 8482 (Schink).

516 Tr. 4733-4735 (Boyle).

a. Interim Rates

190. In determining "reasonable" interim fees for the public performance of music, the rate court applies a standard that attempts, in part, to replicate what would happen in a free market negotiation.[517]

191. In an ASCAP rate court decision issued in 1989, Magistrate Dolinger set interim rates for a variety of cable networks.[518] These rates were still applicable in 1998-1999.[519] In determining interim rates for basic cable networks, including USA, Lifetime, Discovery, and A&E, the court, relying on a prior marketplace-negotiated license agreement for SHO/TMC, set a rate of 0.3% of each cable network's gross revenue.[520] For premium channels, which had no advertising revenue, the court set an interim rate of $0.15 per subscriber per year.[521] The royalty rate was derived from a previous final litigated license rate that was equivalent to 0.3% of the per-subscriber fees paid to the premium channels by the cable systems who carried them.[522] This rate applies to the use of ASCAP music,

517 Tr. 4679 (Boyle).

518 Tr. 4728-4729 (Boyle); NAB Demo 12.

519 Tr. 4768 (Boyle).

520 Tr. 4738-4739 (Boyle); NAB Demo 12 at 6-7 & n. 8, 9.

521 NAB Demo 12 at 9.

522 Tr. 4732-4738 (Boyle); NAB Demo 12 at 4-6, 9.

and covers Showtime/The Movie Channel, HBO, Disney, Bravo, and American Movie Classics.[523] The Court adopted higher interim royalty fees of 0.7% for music-intensive services such as Country Music and The Nashville Network.[524] The rate court later set a reduced interim royalty rate of 0.2% for sports-oriented Madison Square Garden Network, because of its lower use of music.[525] The court also suggested that it would have adopted a similarly reduced interim royalty rate for news-oriented services CNN and Headline News, but had not been presented with sufficient empirical evidence regarding their lower music usage.[526]

b. Marketplace licenses

192. The interim rates were replaced in several instances by subsequent market-negotiated license rates. Some negotiated rates for cable networks were actually lower than the interim rates, but in general they were somewhat higher.[527] For the Turner-owned networks, the negotiated royalty rates for CNN were lower

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523 NAB Demo 12 at 9.

524 Tr. 4741-4742 (Boyle); NAB Demo 12 at 6, 9.

525 Tr. 4758 (Boyle); NAB Demo 13.

526 Tr. 4742-4743 (Boyle); NAB Demo 13 at 2 n. 2.

527 Tr. 4773-4774 (Boyle) (more than 10% higher but less than 100% higher than the 0.3% interim rates).

than those charged for Turner's general entertainment networks, because of the news service's lower usage of music.[528]

193. For the music-intensive services Country Music Television and TNN, BMI recently entered a negotiated agreement for a 0.9% royalty fee in place of the 0.7% interim fee that had been set by the Rate Court.[529]

194. With respect to locally originated cable programming, the only music use license as to which the Music Claimants receive royalties directly from cable system operators, the rate court in 1999 had set interim fees for ASCAP that were based on marketplace-negotiated agreements with BMI, which worked out on an interim basis to approximately 9.1¢ per subscriber per year in 1998 and 9.9¢ in 1999.[530] These interim rates were replaced in a pair of subsequent agreements between both ASCAP and BMI and the cable industry, which had retroactive effect and set a rate of 8.3¢ per subscriber per year for both 1998 and 1999 for each of the music licensors.[531]

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528 Tr. 4716-47-18, 4762-4763, 4765 (Boyle). This distinction was also considered in the final negotiated rates agreed to with Madison Square Garden Network. Tr. 4763-4766 (Boyle).

529 Tr. 8469 (Schink).

530 Tr. 4710-4714 (Boyle); NAB Demo 11.

531 Tr. 8775-8780 (Schink); JSC Exhibits 2-R, 3-R.

195. These negotiated license agreements cover all music use in material originated by cable systems, including not only public, educational, and governmental channels, leased access channels, and locally-originated channels, but also all advertising the cable operator inserts on those channels as well as the advertising it inserts on basic cable networks.[532] By taking the combined total annual fee per subscriber under these agreements for both of the principal Music Claimants (16.6¢), multiplying that fee by the total numbers of cable subscribers in 1998 and 1999, and comparing the totals with the total local advertising revenues of the cable systems in 1998 and 1999, the royalty fee can be expressed as a percentage of a portion of the revenues associated with the music use.[533] That percentage -- counting only advertising revenues as a base and covering the total negotiated-license fees paid to both ASCAP and BMI -- is 0.4% of advertising revenues.[534]

196. ASCAP prefers to use revenues as a base against which to assess music-use royalty fees.[535]

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532 Tr. 8777-8778 (Schink); Tr. 4707-4709 (Boyle).

533 Tr. 8729-8732 (Schink).

534 Tr. 8732 (Schink).

535 Tr. 4719-4720 (Boyle).

197. To determine a proper estimate for a royalty fee covered by all the Music Claimants, Dr. Schink recommended doubling the appropriate applicable interim fee or negotiated rate, based on the marketplace fact that ASCAP and BMI often take comparable license fees, but that SESAC is relatively small.[536]

198. Based on his analysis of both the interim rates and actual marketplace negotiations, Dr. Schink testified that the total 1998-1999 music licensing fees paid for general entertainment networks will not exceed one percent of those networks' revenues.[537] The total 1998-1999 music licensing fees paid by sports networks and news networks will not exceed .5 percent of those networks' revenues.[538] The total 1998 music license fees paid by music intensive cable networks will not exceed 2 percent of those networks' revenues.[539]

c. Differential Music Use

199. In actual marketplace negotiations, the Music Claimants' organizations generally determine royalty rates for the different programming

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536 Tr. 8470 (Schink).

537 Tr. 8471-8472 (Schink).

538 Tr. 8472-8473 (Schink).

539 Tr. 8469-8471 (Schink).

services based on the amount of music that is used.[540] For instance, Dr. Boyle testified that in dealing with cable networks, a higher license fee would be sought for a general entertainment network than a sports network or news network since a general entertainment network uses more music than other services.[541]

200. Dr. Boyle also admitted that in a free market, "it is not necessarily the case that [Music Claimants] would be seeking 5.1 percent from each [claimant] group."[542] Rather, he agreed that they would "be looking at a number of factors, and one of those factors would be the music density use in each of those [claimant] groups."[543]

201. The average music minutes per hour on station-produced news programming in 1998-1999 were 3.85 minutes per hour.[544] Based on the average music minutes for station-produced news, an allocation methodology for news programming could be calculated in the same way Dr. Schink suggested for the Sports Claimants' programming, for comparison with the other claimant

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540 Tr. 4597-4598 (Boyle).

541 Tr. 4597-4598 (Boyle); JSC Exhibit No. 38-X.

542 Tr. 4599-4600 (Boyle).

543 Tr. 4600 (Boyle).

544 Tr. 8462 (Schink), NAB 1998-1999 Exhibit 40 RX.

categories.[545] By this method, the news programming allocation would be 0.175 percentage points for every 1.0 percentage point allocated to other programming.[546] Once an allocation is made for the claimant groups, the 0.175 percentage points could be used to calculate the amount NAB must contribute to Music Claimant's share.[547]

202. Another way is to allocate the share among the claimants based on the music license fees charged to a similar cable network.[548] For example, when negotiating with CNN, ASCAP recognized the fact that a news network used less music then a general entertainment network, and thus CNN's rate was also less than that of a general entertainment network.[549] The final negotiated agreement for CNN reflected the fact that as a news network, CNN used music less intensively than a general entertainment network.[550] In general, cable news networks use music less intensively than general entertainment networks.[551]

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545 Tr. 8462 (Schink); Testimony of Dr. George R. Schink at 22-23.

546 Tr. 8462–8463 (Schink).

547 Tr. 8462-8465 (Schink).

548 Testimony of Dr. George R. Schink at 23-24.

549 Tr. 4762-4768 (Boyle).

550 Tr. 4765 (Boyle).

551 Tr. 4767 (Boyle).

d. Radio Study

203. Mr. Krupit collected statements of accounts attempting to demonstrate that "music is used quite a bit on retransmitted [radio] signals."[552] No evidence was submitted, however, and no effort was undertaken, to determine whether any station listed in any of the statements of account had been retransmitted outside its local service area.[553]

204. No effort was undertaken to determine if any of the stations was actually a music station or to identify the stations as actual distant signals.[554] No analysis was undertaken to determine if any of the music played on the radio stations was in the public domain.[555]

205. The 4.5% that was awarded to Music Claimants in 1983 also included some compensation for commercial radio broadcast on cable systems and carried as a distant signal.[556]

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552 Tr. 4273-4247 (Krupit).

553 Tr. 4321-4322 (Krupit).

554 Id.

555 Tr. 4325-4326 (Krupit).

556 Tr. 4644-4646 (Boyle); see 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12812 (Apr. 15, 1986).

III. PROPOSED CONCLUSIONS OF LAW

206. The Panel is required to act in this proceeding "on the basis of" both "prior decisions of the Copyright Royalty Tribunal" and "prior copyright arbitration panel determinations" as well as "a fully documented record."[557] The Panel should accordingly start from the basis of the last litigated shares awarded to the parties, and ask two questions: (1) Have changed circumstances occurred since the last litigation that require a change in the parties' prior awards? and (2) Have any parties presented persuasive evidence "tending to show that past conclusions were incorrect"?[558]

207. Both of these questions must be asked within the framework of the decisional criterion that has been developed over years of prior proceedings involving these same parties -- the relative marketplace value of the distant signal program categories.[559]

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557 17 U.S.C. § 802(c).

558 National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922, 932 (D.C. Cir. 1985).

559 See 1990-1992 CARP Report at 23 ("market value" is "the only logical and legal touchstone").

208. The record of this proceeding provides substantial answers to both of the important questions. First, there was an undeniable sea change in the cable industry between 1992 and 1998 that markedly affects the relative shares of the program categories in the distant signal market.[560] The evidence establishes that the royalty award of the Commercial Television category (and those of the Canadian Claimants and Public Television Claimants) should be increased as a result, and the award of Program Suppliers should be decreased.

209. Second, new evidence under the marketplace value criterion demonstrates that prior determinations were incorrect, and should be modified. In particular, substantial new evidence, along with changes in old evidence, fully meet the 1990-1992 Panel's stated conditions for awarding Commercial Television its Bortz Survey share. Moreover, new marketplace evidence regarding the relative value of music used on cable, which was unavailable at the time of the last litigated Music award, establishes that the prior Music Claimants award was substantially overstated.

210. The Phase I parties are fortunate not to have to reinvent the evidentiary wheel in every proceeding. Both of the "centerpiece" quantitative

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560 Statement of Richard V. Ducey at 7; Tr. 1593 (Ducey); Tr. 384-385 (Trautman).

studies upon which the 1990-1992 CARP and the CRT relied so heavily in prior distribution proceedings -- the Bortz cable operator survey and the MPAA/Nielsen viewing study -- are presented again in this proceeding.[561] Both have been tweaked and improved in successive proceedings, so that the parties no longer need to litigate over fundamental methodological issues. Together, these studies provide the quantitative foundation for the range within which the royalty awards should be set.

211. Over the past six litigated proceedings, the CRT and the CARP have adopted significant upward changes in the shares of the Commercial Television Claimants and downward changes and Program Suppliers. Their awards have been as follows:

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561 See Bortz Survey and ¶ 83, supra.

Basic Fund Royalty Awards

Proceeding	Commercial Television	Program Suppliers
1978[562]	<3.25%	75%
1979[563]	4.50%	70%
1980[564]	4.50%	70%
1983[565]	5.00%	67.1%
1989[566]	5.70%	60%
1990-1992[567]	7.16%	52.53%

In the 1998-1999 proceeding, evidence supports a continuation of this trend, but with much more substantial changes in these shares.

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562 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026 at 63037-63038 (Sept. 23, 1980).

563 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9879 at 9897 (Mar. 8, 1982).

564 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552 at 9569 (Mar. 7, 1983). This decision was appealed on the basis, supported by the dissenting statement of one of the CRT Commissioners, that the CRT had followed "changed circumstances" as its sole criterion for setting the awards. See id. (Minority Views of Commissioner Burg). The Court did not agree that the CRT majority had done so, but made clear that both changed circumstances and new approaches should be considered. National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922, 932 (D.C. Cir. 1985).

565 1983 Cable Royalty Distribution Determination, 51 Fed. Reg. 12792 at 12818 (Apr. 15, 1986).

566 1989 Cable Royalty Distribution Determination, 57 Fed. Reg. 15286 at 15304 (Apr. 27, 1992).

567 Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653 at 55669 (Oct. 28, 1996) (1991-1992 Basic Fund shares).

A. THE COMMERCIAL TELEVISION CLAIMANTS SHARE

212. The 1990-1992 CARP Panel Report awarded 7.5% of the Basic and 3.75 royalties to the Commercial Television category.[568] It found that the Bortz Surveys for the three years allocated 11.9% to 14.8% to the category, and its Nielsen viewing share was between 7% and 8%.[569] It found that there were no changed circumstances between 1989 and 1990-1992 that required an increase in the Commercial Television share,[570] and that the Nielsen viewing percentage did not provide corroborating support for the Bortz Survey shares.[571] Hence, it awarded Commercial Television a share equal to its viewing share.[572]

213. The Bortz Surveys for 1998-1999 allocated an average of 14.8% to the Commercial Television category,[573] and the average Nielsen viewing share for the category for 1998-1999 was 14.7%.[574] The average Bortz Survey share for

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568 1990-1992 CARP Report at 113. This award was later adjusted to 7.1625% of the royalties remaining after the deduction of the NPR settlement share, to account for the Music settlement amount. Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653 at 55669 (Oct. 28, 1996)

569 1990-1992 CARP Report at 111.

570 Id. at 112.

571 Id.

572 Id. at 112-113.

573 See PF Bortz Survey, supra.

574 SeePF ¶ 82, supra.

Commercial Television on an unweighted basis for 1998-1999 was <u>15.75%</u>.[575] Moreover, NAB and other parties presented substantial evidence of changed circumstances supporting an increase in the Commercial Television award, along with substantial evidence corroborating the Bortz Survey share as a valid measure of the relative marketplace value of Commercial Television programming.

1. CHANGED CIRCUMSTANCES

214. The principal changed circumstance affecting the relative marketplace value of the programming categories within the distant signal marketplace was the effective elimination of WTBS from the compulsory license system with its conversion to a direct-licensed cable network on January 1, 1998.[576] During the many years in which it had been the most widely carried distant signal superstation, WTBS was both dominant and different.[577] Its removal had the effect of significantly shifting the relative amounts and types of programming purchased by cable operators as distant signals.[578]

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575 <u>See</u> PTV Exhibit 10-R.

576 Statement of Dr. Richard V. Ducey at 7; Tr. 1593 (Ducey); Tr. 384-385 (Trautman).

577 <u>See</u> PF The Elimination of WTBS, <u>supra</u>.

578 <u>Id.</u>

215. The shift was plainly demonstrated in several different ways by evidence in the proceeding. The Fratrik programming time study compared the relative amounts of the Phase I program types that were purchased on distant signals in 1992 and 1998-1999.[579] That study, which was the first in the history of these proceedings that was designed to measure all distant signals as well as all program categories, established without doubt that there was a significantly larger percentage of Commercial Television programming purchased by Form 3 cable operators in 198-1999 than had been purchased in 1992.[580] Specifically, the study showed that the relative share of distant signal program time represented by Commercial Television programming increased from 8.8% in 1992 to 13.0% in 1998-1999.[581]

216. Moreover, an analysis of the 1992 data alone showed that the programming mix on WTBS was significantly different from the mix among all other distant signals, with a greater proportion of syndicated series and movies than the average.[582] This same conclusion was independently confirmed by the

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579 See PF ¶ 16, supra.

580 Id.

581 See PF ¶ 22, supra.

582 See PF ¶ 15, supra.

program time evidence contained within the Nielsen viewing study data put into evidence in the 1990-1992 proceeding.[583]

217. The significant change in the relative share of Commercial Television programming in the distant signal marketplace was even more emphatically demonstrated by the change in the Nielsen viewing study results. The viewing study has been presented in every proceeding since the 1979 case. The viewing share reported by Program Suppliers for the Commercial Television category ranged from 4% to 8% in those studies.[584] But in 1998-1999, the viewing share nearly doubled, to 14.4% in 1998 and 15.0% in 1999.[585]

218. Besides this remarkable change in one of the viewing shares, the Commercial Television category's Bortz share increased between 1990-1992 and 1998-1999, from an average of 13.0% to an average of 14.8%.[586] This principal measure of relative marketplace value has stayed stable over the years, but showed an increase in the Commercial TV share and a decrease in the Program Suppliers

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583 See PF ¶ 12, supra.

584 See NAB Demo 21.

585 See PF ¶ 82, supra. These percentage share are the Full Year Household viewing percentages, which are comparable to the shares reported in the 1990-1992 proceeding.

586 See PF paras 62-63 supra.

share, which was consistent with the change in the marketplace caused by the elimination of WTBS as a distant signal.

219. Other evidence of changed circumstances between 1990-1992 and 1998-1999 also supports an increased Commercial Television award. Among other changes, there was an increase in the amount of "clustering" -- carriage of relatively nearby distant signals -- between 1990-1992 and 1998-1999.[587] The increase in the proportion of the syndicated shows and movies on the distant signal version of WGN's that were non-compensable substitute programs also, given the scope of WGN's carriage, increased the relative importance of other distant signal programs, including station-produced news and other programs in the Commercial Television category.[588]

2. MARKETPLACE VALUE

220. The best quantitative measure of the relative marketplace value of distant signal programming categories is the Bortz cable operator survey. Its results provide a substantial starting point for determination of the royalty awards for 1998-1999.

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587 See PF paras 44-46 supra.

588 See PF paras 25-26 supra.

221. The remarkable increase in the Commercial Television share in the Nielsen viewing study, one of the two centerpiece quantitative studies also supports an increase in the Commercial Television award under the marketplace value criterion. More particularly, it directly addresses a principal basis the 1990-1992 CARP stated for its refusal to award NAB its Bortz Survey share in that proceeding. In its discussion of evidence corroborating the Bortz share, the Panel held that the viewing percentage, which was lower than Commercial Television's average 1990-1992 Bortz share, did not support an award of the Bortz share.[589] In this case, by marked contrast, the viewing study share has risen to the level of the Bortz Survey shares, and should be held to corroborate Commercial Television's Bortz share for purposes of calculating its award.

222. NAB also provided substantial new evidence corroborating the Bortz Surveys in the form of a regression analysis. Dr. Gregory Rosston, who designed and performed the regression study, explained that it was an econometric technique to measure the relationship between inter-related independent variables and a "dependent" variable.[590] In this case, he analyzed the relationship between the amounts of the various distant signal programming categories actually purchased by Form 3 cable operators in 1998-1999 and the amounts of copyright

589 1990-1992 CARP Report at 112.

royalties they paid.[591] The resulting coefficients, representing "implied prices" of the marginal minute of programming purchase in each category, were multiplied by the volume of programming actually purchased to arrive at relative shares.[592] As JSC witness Dr. Crandall agreed, these shares, in terms of rank order and general orders of magnitude, provided powerful corroboration of the relative shares measured by the Bortz Survey.[593] Based on a further analysis Dr. Rosston performed, which used more information from the data and resulted in a higher share for the Commercial Television category, Dr. Rosston concluded that the 10.9% share his basic regression model implied for the Commercial Television category was a lower bound on that category's actual relative marketplace value.[594]

223. The Bortz Survey results for Commercial Television are also corroborated by evidence from cable operator witnesses, many appearing for the Joint Sports Claimants and other parties, as well as the descriptions of the important economic incentives that drive cable operator programming decisions,

(...continued)

590 See PF paras 67-70 supra.

591 See PF para 68 supra.

592 See PF paras 72-73 supra.

593 See PF para 76 supra.

594 See PF paras 74-75 supra.

which favor news and other programming that characterizes the Commercial Television category.[595]

224. The Commercial Television share should be based on its Bortz Survey shares, as adjusted to address the "PTV-Only" and "WGN" methodological issues raised by Dr. Fairley, and calculated as described below.

B. THE PROGRAM SUPPLIERS SHARE

225. The Bortz Surveys for 1998-1999 allocated an average of **38.8%** to the Program Suppliers category,[596] and the average Nielsen viewing share for the category for 1998-1999 was **60.0%**.[597]

226. The radical reduction in the Program Suppliers' share in its own centerpiece viewing study requires a significant downward adjustment in their award. The viewing studies have consistently shown a viewing share of 80% or above in all prior proceedings.[598] The 25% reduction in their viewing share for

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595 See PF paras 28-58 supra.

596 See PF ¶ 63, supra.

597 See PF ¶ 77, supra.

598 See PF ¶ 83, supra.

1998-1999 was attributable in large measure to the elimination of WTBS from the distant signal marketplace.[599]

227. The newly proposed "avidity" adjustments presented by Dr. Gruen in an attempt to increase the Program Suppliers' viewing-based share were flawed both in their conception and in their execution.[600] There is no justification for discarding over half of the viewing data to focus exclusively on 18-49 demographic.[601] His proposed adjustments do not measure avidity, rely on a viewing/time analysis that has previously been rejected, and incorporate arbitrary and erroneous calculations.[602]

228. The Bortz Survey share for Program Suppliers also declined between 1990-1992, when it averaged 42.5%, to 1998-1999, when it averaged 38.8%.[603] Program Suppliers' award should be based on their Bortz share, as shown below.

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599 See PF ¶ 84, supra.

600 See PF ¶ 86, supra.

601 See PF ¶ 87-89, supra.

602 See PF ¶ 93-98, supra.

603 See PF ¶ 106, supra.

C. THE JOINT SPORTS CLAIMANTS SHARE

229. The Bortz Surveys for 1998-1999 allocated an average of 37.9% to the Joint Sports Claimants category,[604] and the average Nielsen viewing share for the category for 1998-1999 was 8.5%.[605]

230. The Joint Sports Claimants demonstrated no material changed circumstances that would increase the relative marketplace value of sports programming between 1990-1992 and 1998-1999, and indeed there are none. The share of sports programming time remained essentially constant between the two time periods, at 4.8% in 1992 and 4.9% in 1998-1999.[606] Its Bortz Survey share remained essentially constant, at an average of 37.4% in 1990-1992 and 37.9% in 1998-1999.[607] And its viewing study shares remained essentially constant, at 6% to 7% in 1990-1992, compared with 7% to 9% in 1998-1999.[608]

231. The Joint Sports Claimants award should be based on their Bortz Survey shares, calculated as described below.

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604 See PF ¶ 106, supra.

605 See PF ¶ 82, supra.

606 NAB 1998-1999 Exhibit 5.

607 Testimony of James M. Trautman at 11, 26 (providing separate 1990, 1991, and 1992 share numbers, which average to 37.4%).

D. THE PUBLIC TELEVISION CLAIMANTS SHARE

232. The Bortz Surveys for 1998-1999 allocated an average of **2.9%** to the Public Television category,[609] and the average Nielsen viewing share for the category for 1998-1999 was **16.0%**.[610]

233. The Public Television share of the overall programming time in the distant signal marketplace rose substantially with the elimination of WTBS form the pool. Its percentage share of the total distant signal programming made available to subscribers in 1998-1999 was 14.9%, compared with only 5.0% in 1992.[611] This increase was consistent with the substantial increase in its Nielsen viewing study share, from 2% to 4% in 1990-1992 to an average of 16% in 1998-1999.[612]

234. Public Television's share in the Bortz Survey, as initially reported, did not show an increase. But the 1998-1999 survey was subject to a methodological question that had not been present in the 1990-1992 Bortz Surveys,

(...continued)

608 See NAB Demo 21.

609 See PF ¶ 106, supra.

610 See PF ¶ 82, supra.

611 NAB 1998-1999 Exhibit 5.

resulting from the exclusion of systems selected as part of the original sample if they carried only a PBS or only a Canadian distant signal. PTV witness Dr. William Fairley proposed adjustments to the study results to correct this flaw, and the resulting adjusted share for Public Television does show an increase over the 1990-1992 Bortz Survey results.

235. Dr. Fairley also proposed additional adjustments to the Bortz share to reflect other issues he raised, which would have the effect of further increasing the Bortz share for Public Television.[613] In addition, PTV witness Dr. Leland Johnson proposed an independent methodology for determining the PTV share based on increases in PTV's relative share of distant subscriber incidents, which would set the PTV share at 10% or more.[614]

236. The PTV award should be based on its Bortz Survey share, as adjusted, and as calculated below.

(...continued)

612 NAB Demo 21; PS Exhibits 20, 22.

613 See PF paras 64-65, 115, supra.

614 See PF paras 144-150, supra.

E. THE CANADIAN CLAIMANTS SHARE

237. The Bortz Surveys for 1998-1999 allocated an average of 0.3% to the Canadian Claimants category.[615]

238. None of the quantitative measures in this proceeding are able to provide reliable figures for the relative value of the Canadian programming in the distant signal marketplace. Programs on Canadian distant signals were not included in the viewing study.[616] Canadian witness Dr. John Calfee stated that "methods that are adequate for substantial market shares cannot work for shares that are inherently small."[617] Dr. Calfee testified in the 1990-1992 proceeding that "the Bortz study cannot distinguish between a relative market valuation of 0 for Canadian programming and a relative market valuation of perhaps three or four percent."[618] Mr. Trautman, in his report, agreed that the Bortz survey methodology was not designed to develop estimates with small relative error rates for programming carried by a very small number of systems that when measured accounts for a small amount of value.[619] Dr. Calfee noted that the 1998-1999 Bortz

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615 See PF ¶ 106, supra.

616 Tr. 8020 (Gruen).

617 An Economic Evaluation of Proposed Method for Assessing the Market Value of Programming on Canadian Distant Signals ("Calfee") at 3.

618 Calfee at 4.

study included only 2 systems with Canadian signals in 1998 and 3 systems with Canadian signals in 1999.[620]

239. Dr. Calfee also found that the Rosston model could not be used to provide "reasonable estimates of market valuation of Canadian programming obtained through distant signals, and cannot be used to allocate royalty payments in a manner that yields a reasonable allocation for Canadian programming."[621] Dr. Rosston admitted that a possible reason for the Canadian coefficient not being statistically significant was the small number of observations for Canadian programming.[622]

240. In 1990-92, the Canadian Claimants asked for 56% of the basic fund royalties generated by Canadian distant signals, which would have been equal to 1.1% of the basic royalties.[623] The CARP allocated 1% of the basic fund to the Canadians for both 1991 and 1992.[624] Thus, the CARP did not give the Canadian

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(...continued)

619 Testimony of James M. Trautman at 42.

620 Calfee at 4; Tr. 549-551 (Trautman).

621 Calfee at 9.

622 Tr. 2901-2902 (Rosston).

623 1990-1992 CARP Report at 141.

624 Id.

claimants 56% of the full amount of fees that Cable Data Corporation estimated were generated by the carriage of Canadian distant signals.

241. The Canadian Claimants should receive 1.52% of the Basic Fund and 0.24% of the 3.75 Fund for the 1998-1999 period. Using Canadian Claimants exhibits 4-A and 4-B (pages 1,3,4), the Basic Fund total for 1998 is $90,562,603 and for 1999 is $94,195,296.[625] The estimated amount of Basic fees paid for Canadian distant signals is $2,239,646 for 1998 and $2,583,064 for 1999.[626] Dividing the amount of Basic fees paid for Canadian distant signals by the Basic Fund total equals 2.47% for 1998 and 2.74% for 1999. The Canadian percentage of the Basic Fund should be the amount paid for Canadian distant signals multiplied by the relative value shares as measured by the Canadian cable operator surveys. Cable operators placed a relative value on Canadian programming of 59% for 1998 and 58% in 1999.[627] Making this calculation, the Canadian claimants should receive 1.46% of the Basic Fund for 1998 and 1.59% for 1999.

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625 For 1998-1, 1998-2, 1999-1 and 1999-2, take the total fees paid (from Canadian Ex. 4-A), then subtract the fees paid for the syndex and 3.75 funds to obtain the total fees paid for the basic fund. Canadian Ex. 4-A; Canadian Ex. 4-B at 1, 3-4.

626 Canadian Ex. 4-B at 4.

627 "The Value of Canadian Programming to Cable Systems in the United States: 1996-1999" at 4.

242. For the 3.75 Fund, the total fees were $9,671,797 for 1998 and $10,408,844 for 1999.[628] The total amounts paid for Canadian distant signals on a 3.75 fee basis were $24,539 for 1998 and $59,555 for 1999.[629] Dividing the amount of 3.75 fees paid for Canadian distant signals by the total 3.75 Fund results in shares of 0.25% for 1998 and 0.57% for 1999. The Canadian percentage of the 3.75 Fund should be the amount paid for Canadian distant signals multiplied by the relative value shares as measured by the Canadian cable operator survey. Thus, the Canadian share of the 3.75 Fund should be 0.15% for 1998 and 0.33% for 1999. The Canadian claimants insist that their royalty share should be based on a fees-generated approach. While there are many problems with such an approach, and while this approach has been rejected in past proceedings,[630] the Canadians request that their share be based on what has been paid for Canadian signals. A royalty share of 1.52% for the Basic Fund and 0.24% of the 3.75 Fund is exactly what has been paid for carriage of Canadian distant signals.

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628 Canadian Ex. 4-B at 2.

629 Canadian Ex. 4-B at 2.

630 Tr. 5471-5472 (Bennett); 1979 Cable Royalty Decision, 47 Fed. Reg. 9879, 9984 (Mar. 8, 1982); 1980 Cable Royalty Decision, 48 Fed. Reg. 9552, 9569 (Mar. 7, 1983); 1983 Cable Royalty Decision, 51 Fed. Reg. 12792, 12808 (Apr. 15, 1986); 1990-1999 CARP Report at 141.

F. THE MUSIC CLAIMANTS SHARE

243. None of the comprehensive quantitative studies presented in this proceeding provided a measure of the relative marketplace value of the music element in distant signal programming.[631] Because music is an embedded element of the programs themselves, it would be difficult to devise a single approach that could measure the relative value of programs and the music within them.[632]

244. The Music Claimants propose that their share be adjusted upwards, on the basis of asserted changed circumstances between 1990-1992 and 1998-1999. That is an invalid approach, because there was no adjudication in the 1990-1992 proceeding as to the relative marketplace value of distant signal music.[633] If changed circumstances were to be considered, the change would have to be measured across the period 1983, the proceeding for which Music's award was last adjudicated, to 1998-1999.[634]

245. In any event, the Music Claimants' attempt to show changed circumstances in the form of increased music usage between either 1983 or 1991-

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631 See PF ¶ 187, supra.

632 Id.

633 See PF ¶ 179, supra.

634 See PF ¶ 171, supra.

1992 and 1998-1999 fails.[635] Their music usage study is flawed in its design and execution. It does not demonstrate any increase in music usage over either period.[636]

246. Most critically, however, there is new evidence in this proceeding that tends to show that the CRT's award of 4.5% of the royalty funds to the Music Claimants in the 1983 proceeding was substantially higher than the relative marketplace value of music in the distant signal marketplace.[637] All of the evidence involved license fees for music use in the cable context that arose only after the CRT issued its 1983 Distribution decision in April 1986.[638]

247. The evidence consists of a series of rate court determinations setting reasonable music license fees for various cable-related uses of music on an interim basis, as well as license agreements negotiated in the marketplace.[639] With respect to the rate court decisions, the court consistently set interim rates for the use of ASCAP's or BMI's music by basic cable networks and premium cable channels that provided general entertainment services at a level that was

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635 See PF ¶ 181-182, supra.

636 Id.

637 See PF ¶ 183-194, supra.

638 Id.

equivalent to 0.3% of the channel's gross revenues.[640] For ASCAP, BMI, and SESAC combined, those interim rates would total between 0.6% and 0.9% of the cable channel's gross revenues.[641] The "gross revenues" of the distant signals carried by cable systems, directly equivalent to the per-subscriber fees paid to premium channels by cable systems, would be the royalty funds paid by cable operators to carry distant signals. Thus, the interim rate decisions consistently support a total share for Music Claimants of less than 0.9% of the royalty funds.[642]

248. These interim rates were converted in some cases to license agreements negotiated in the marketplace between the music licensing societies and various cable networks.[643] Music Claimants witness Peter Boyle testified that, for ASCAP, the confidential marketplace royalty rates negotiated with one group of important cable networks were, in general, somewhere between 10% and 100% higher than the interim rates.[644] This would translate into royalty rates between 0.3% and 0.6% of gross revenues for ASCAP alone. For the three licensing societies,

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(...continued)

639 Id.

640 See PF ¶ 186-187, supra.

641 See PF ¶ 186-194, supra.

642 See PF ¶ 186-187, supra.

643 See PF ¶ 188-191, supra.

644 See PF ¶ 188-192, supra.

the range based on these very rough approximations would fall somewhere between 0.7% (110% of the low end) and 1.8% (200% of the high end).

249. But the Music Claimants focused especially on the royalty agreement very recently negotiated between ASCAP and BMI and the entire cable industry for the use of music in locally originated cable programming and local cable advertising. Based on the marketplace-set rates applicable in 1998 and 1999, the total royalty fees for both major licensing societies would constitute less than 0.4% of gross revenues from use of music in locally originated cable programming and advertising.[645]

250. None of the new marketplace value evidence supports a share for the Music Claimants of anything close to 4.5% of the royalties. Their award should be set at 0.9% of the three funds.

645 See PF ¶ 188-191, supra.

PROPOSED ALLOCATION CALCULATION METHODS

1. While there are minor differences in the share results for various program categories in the 1998 versus 1999 Bortz surveys, they do not require separate calculations. There was no evidence of changed circumstances between 1998 and 1999, and the royalty funds for the two years are essentially identical in size. Hence, the following proposed share calculations use average numbers for the two years.

2. The Public Television Claimants have proposed a series of adjustments in the Bortz Study results to address and account for several conceptual and methodological criticisms they raise concerning the study.[646] The minimum adjustment that must be made to accommodate these criticisms is to correct for a methodological error in the treatment of systems that carried only a PTV distant signal or only a Canadian distant signal.[647] Bortz simply omitted these systems from the survey, even though they had been properly selected as part of the initial sample. Given the structure of the survey, it can be assumed that these systems, if

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646 See PF ¶ 64-65, supra.

647 Id.

they had been included within the completed survey, would have allocated 100% of the value of the programming on the distant signals they actually carried to the PTV and Canadian categories, respectively.

3. PBS witness William B. Fairley proposed a number of alternative ways to correct for this error, along with others. JSC witness James Trautman, while acknowledging the error, proposed an adjustment to his Study results on rebuttal that was based on a faulty "fee-generated" calculation for PTV and Canadian stations rather than treating the omitted systems in the same way as other respondents.[648]

4. Dr. Fairley's adjustment calculations were broken out at the request of the Panel to permit the application of one or more adjustments in various combinations. His spreadsheet designated "Method 3, Version 1"[649] applies the "PTV-only and Can-only" adjustment first. Use of these adjustments, by simply adding them to the base Bortz Study results, provides the correction for the "PTV-only" methodological error described above.

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648 Rebuttal Testimony of James M. Trautman at 6-8.

649 PTV Exhibit 10-R at page 1.

5. Dr. Fairley reported his calculations using unweighted response data underlying the Bortz Study. JSC failed to provide a usable version of the correction for the "PTV-only" error based on weighted data. Hence, the following calculations are based on unweighted data.

6. The first step in the calculations, to correct for the "PTV-only" error, is to add the correction factors shown on Dr. Fairley's Method 3, Version 1 spreadsheet to the original combined 1998-1999 percentage shares from the Bortz Study, resulting in the following adjustments:

Figure 1

ADJUSTED BORTZ SURVEY SHARES 1998-1999 (PTV-only Correction)[650]			
	Bortz Survey 1998-1999 Combined Results (Unweighted)	PTV-only and Can-only Corrections	Adjusted Bortz Survey Results
Program Suppliers	37.79%	-2.49%	35.30%
Joint Sports Claimants	37.33%	-2.46%	34.86%
Commercial TV	15.75%	-1.04%	14.71%
Public Television	3.07%	3.96%	7.03%
Canadian	0.26%	2.41%	2.67%
Devotional	5.81%	-0.38%	5.43%
Music	0.00%	0.00%	0.00%
TOTAL	100.00%	0.00%	100.00%

650 Id.

7. The next necessary calculation is an adjustment to reflect the fact that, although the Bortz Study measures the relative value of distant signal program categories across all distant signals carried by Form 3 cable operators, Public Television stations are never carried pursuant to the 3.75 royalty rate. To permit appropriate royalty awards, PTV's Bortz Study share thus must be adjusted to reflect PTV's percentage share for the Basic Fund royalties only. This calculation is accomplished by dividing the adjusted PTV percentage share by 0.9 (to reflect the fact that the Basic Fund royalties account for approximately 90% of the 1998-1999 royalty funds),[651] and then allocating the difference in the PTV share among the other program categories in proportion to their relative shares. These calculations result in the following further adjustments:

651 Id.

Figure 2

BASIC FUND ALLOCATIONS 1998-1999 (Basic Fund-Only Adjustment)				
	Bortz Survey 1998-1999 Combined Results (Unweighted)	PTV-only and Can-only Corrections	Adjusted Bortz Survey Results	Basic Fund-Only Adjustment
Program Suppliers	37.79%	-2.49%	35.30%	35.00%
Joint Sports Claimants	37.33%	-2.46%	34.86%	34.57%
Commercial TV	15.75%	-1.04%	14.71%	14.58%
Public Television	3.07%	3.96%	7.03%	7.81%
Canadian	0.26%	2.41%	2.67%	2.65%
Devotional	5.81%	-0.38%	5.43%	5.38%
Music	0.00%	0.00%	0.00%	0.00%
TOTAL	100.00%	0.00%	100.00%	100.00%

8. In order to make the ultimate allocations, however, further adjustments must be made to reflect the separately-determined shares of the Devotional Claimants, the Music Claimants, and the Canadian Claimants. The Devotional Claimants settled the proceeding for a share of 1.19375% of the Basic Fund royalties. The Music Claimants, as explained above, should be awarded a share of 0.9% of the Basic Fund royalties. And the Canadian Claimants, as explained above, should receive a share of 1.52% of the Basic Fund royalties. The relative shares can be calculated by setting these claimants' shares at the specified amounts, and then allocating the remainder (100% minus the sum of these three shares) among the four remaining claimant groups in proportion to their respective adjusted percentage shares. These calculations result in the following shares,

reflecting the minimal adjustments necessary to reflect the "PTV-only" error and the Basic Fund-Only calculation:

Figure 3

BASIC FUND ALLOCATIONS 1998-1999 (All Share Adjustments)					
	Bortz Survey 1998-1999 Combined Results (Unweighted)	PTV-only and Can-only Corrections	Adjusted Bortz Survey Results	Basic Fund-Only Adjustment	Adjustments to Reflect Devotional, Canadian, and Music Awards
Program Suppliers	37.79%	-2.49%	35.30%	35.00%	36.73%
Joint Sports Claimants	37.33%	-2.46%	34.86%	34.57%	36.28%
Commercial TV	15.75%	-1.04%	14.71%	14.58%	15.30%
Public Television	3.07%	3.96%	7.03%	7.81%	8.20%
Canadian	0.26%	2.41%	2.67%	2.65%	1.40%
Devotional	5.81%	-0.38%	5.43%	5.38%	1.19%
Music	0.00%	0.00%	0.00%	0.00%	0.90%
TOTAL	100.00%	0.00%	100.00%	100.00%	100.00%

9. The 3.75 Fund allocations can be calculated in the same way, by setting the PTV share at zero, setting the Devotional share at its settlement amount (0.90725%), setting the Canadian share at 0.24% as explained above, setting the Music share at 0.9% as explained above, and then allocating the remainder of the 3.75 Fund (100% minus the total of these four shares) among the remaining three claimants in proportion to their respective adjusted Basic Fund shares. These calculations result in the following share allocations for the 3.75 Fund:

Figure 4

3.75 FUND ALLOCATIONS 1998-1999				
	Bortz Survey 1998-1999 Combined Results (Unweighted)	PTV-only and Can-only Corrections	Adjusted Bortz Survey Results	Adjustments to Reflect PBS, Devotional, Canadian, and Music Awards
Program Suppliers	37.79%	-2.49%	35.30%	40.72%
Joint Sports Claimants	37.33%	-2.46%	34.86%	40.23%
Commercial TV	15.75%	-1.04%	14.71%	16.97%
Public Television	3.07%	3.96%	7.03%	0.00%
Canadian	0.26%	2.41%	2.67%	0.27%
Devotional	5.81%	-0.38%	5.43%	0.91%
Music	0.00%	0.00%	0.00%	0.90%
TOTAL	100.00%	0.00%	100.00%	100.00%

10. Dr. Fairley also provided data necessary to make a correction to the Bortz Study shares to reflect the fact that respondents carrying superstation WGN were not directed to omit from their valuations any syndicated programming on the WGN satellite feed that were non-compensable substitute programs.[652] Since well more than half of the syndicated programming on the distant signal version of WGN were non-compensable programs, Dr. Fairley applied an adjustment that reduced the syndicated program categories' valuations reported by respondents who

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652 See PF ¶ 66, supra.

carried WGN by 50% (or a proportionally smaller percentage if the respondent's system carried additional commercial distant signals).[653]

11. Calculating the Basic Fund and 3.75 Fund allocations with the additional partial WGN adjustment can be accomplished in the same step-by-step method as the adjustments described above. The WGN adjustment can be made in sequence between the PTV-Only adjustment and the Basic Fund-Only adjustment. The further adjustment results in the following Basic Fund share calculations:

Figure 5

BASIC FUND ALLOCATIONS 1998-1999
(Using "WGN Adjustment")

	Bortz Survey 1998-1999 Combined Results (Unweighted)	PTV-only and Can-only Corrections	WGN Adjustment	Adjusted Bortz Survey Results	Basic Fund-Only Adjustment	Adjustments to Reflect Devotional, Canadian, and Music Awards
Program Suppliers	37.79%	-2.49%	-8.84%	26.46%	26.23%	27.77%
Joint Sports Claimants	37.33%	-2.46%	5.91%	40.77%	40.42%	42.80%
Commercial TV	15.75%	-1.04%	1.80%	16.51%	16.37%	17.33%
Public Television	3.07%	3.96%	0.19%	7.22%	8.02%	8.49%
Canadian	0.26%	2.41%	0.01%	2.68%	2.66%	1.52%
Devotional	5.81%	-0.38%	0.93%	6.36%	6.30%	1.19%
Music	0.00%	0.00%	0.00%	0.00%	0.00%	0.90%
TOTAL	100.00%	0.00%		100.00%	100.00%	100.00%

653 Id.

12. The 3.75 Fund allocations can be calculated in a similar fashion, resulting in the following share calculations:

Figure 6

3.75 FUND ALLOCATIONS 1998-1999 (Using "WGN Adjustment")					
	Bortz Survey 1998-1999 Combined Results (Unweighted)	PTV-only and Can-only Corrections	WGN Adjustment	Adjusted Bortz Survey Results	Adjustments to Reflect PBS, Devotional, Canadian, and Music Awards
Program Suppliers	37.79%	-2.49%	-8.84%	26.46%	30.95%
Joint Sports Claimants	37.33%	-2.46%	5.91%	40.77%	47.69%
Commercial TV	15.75%	-1.04%	1.80%	16.51%	19.31%
Public Television	3.07%	3.96%	0.19%	7.22%	0.00%
Canadian	0.26%	2.41%	0.01%	2.68%	0.24%
Devotional	5.81%	-0.38%	0.93%	6.36%	0.91%
Music	0.00%	0.00%	0.00%	0.00%	0.90%
TOTAL	100.00%	0.00%	0.00%	100.00%	100.00%

CERTIFICATE OF SERVICE

I, Michael Lazarus, hereby certify that, in accordance with the agreement of all Phase I parties regarding compliance with service requirements, I have caused copies of the foregoing "Proposed Findings and Conclusions of Law of the National Association of Broadcasters" to be sent by electronic mail, in .PDF format, to all parties as specified below, with an asterisk by the name of the representative(s) of each party to whom the electronic mail was sent. I have further caused copies to be sent via hand delivery and/or Federal Express, as specified below, this 20th day of August, 2003 to the following:

ASCAP (FedEx)	(FedEx)
I. Fred Koenigsberg Carol A. Witschel* White & Case Stefan M. Mentzer 1155 Avenue of the Americas New York, NY 10036-2787	Joan M. McGivern* Samuel Mosenkis* ASCAP One Lincoln Plaza New York, NY 10023
BMI	(Hand Delivery)
Marvin L. Berenson Joseph DiMona* Judith M. Saffer Marc D. Ostrow Broadcast Music, Inc. 320 West 57th Street New York, NY 10019	Michael J. Remington* Philip J. Mause* Jeffrey Lopez Adam L. Barea Drinker Biddle & Reath LLP 1500 K Street, NW, Suite 1100 Washington, DC 20005
SESAC	(FedEx)
Patrick Collins SESAC, Inc. 55 Music Square East Nashville, TN 37203	John C. Beiter* Loeb & Loeb LLP 1906 Acklen Avenue Nashville, TN 37212
Canadian Claimants (Hand Delivery)	
L. Kendall Satterfield* Richard M. Volin* Finkelstein, Thompson & Loughram 1050 30th Street, NW Washington, DC 20007	

Public Television Claimants (Hand Delivery)	
Timothy Hester Ronald G. Dove* Covington & Burling 1201 Pennsylvania Ave., NW Washington, DC 20004-2401	Paul Greco* Public Broadcasting Service 1320 Braddock Place Alexandria, VA 22314
Program Suppliers (Hand Delivery)	
Gregory O. Olaniran* Michael E. Tucci Robert L. Eskay, Jr. Stinson Morrison Hecker LLP 1150 18th Street, NW Suite 800 Washington, DC 20036-3816	
Joint Sports Claimants	(Hand Delivery)
Thomas J. Ostertag General Counsel Office of the Commissioner of Baseball 245 Park Avenue New York, NY 10167	Robert Alan Garrett* Ronald A. Schechter James Cooper Christopher Winters* Jule L. Sigall Michele T. Dunlop Arnold & Porter 555 Twelfth Street, NW Washington, DC 20004-1206
Ritchie Thomas Judith Jurin Semo Squire, Sanders & Dempsey 1201 Pennsylvania Ave., NW Washington, DC 20004	Philip R. Hochberg Piper Rudnick LLP 901 Fifteenth Street, NW, Suite 700 Washington, DC 20005

Michael Lazarus